Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

2. Whether the judgment must be reversed because the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33, either on their face or as applied in this case, violate the Appointments and Take Care Clauses of Article II of the United States Constitution?

RULE 29.6 STATEMENT

Petitioner Rockwell International Corp. was renamed Boeing North American, Inc. Petitioner Boeing North American, Inc. has since been merged into The Boeing Company. State Street Bank and Trust Company beneficially owns 10% or more of The Boeing Company's stock.

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OPINIONS BELOW

The opinion of the Tenth Circuit affirming in part and ordering limited remand (Pet. App. 1-48a) is reported at 282 F.3d 787. The opinion of the Tenth Circuit affirming after limited remand (Pet. App. 49-55a) is unreported, but is available at 92 Fed. Appx. 708. The order of the Tenth Circuit denying rehearing and rehearing *en banc* (Pet. App. 56-57a) is unreported.

JURISDICTION

The Tenth Circuit denied rehearing and rehearing *en banc* on January 4, 2006. Pet. App. 56-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 77-82a) reproduces the relevant text of 31 U.S.C. § 3730 and Article II of the United States Constitution.

STATEMENT OF THE CASE

This is a *qui tam* action brought under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, by James S. Stone, a former employee at the Rocky Flats nuclear weapons plant in Golden, Colorado. Rockwell International Corporation ("Rockwell")[1] operated Rocky Flats for the Department of Energy ("DOE"), and the jury found that Rockwell secured some payments from DOE in violation of the FCA. As the case comes to this Court, there is no dispute that Stone's complaint was based on information that had been previously disclosed to the public, and that the *qui tam* provisions of the FCA accordingly barred Stone's claims unless he qualified as an "original source" within the meaning of 31 U.S.C. § 3730(e)(4). The Tenth Circuit's holding that Stone was authorized to maintain the action rested on an interpretation of the original source rule that

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[1] In 1996, The Boeing Company acquired Rockwell and changed its name to Boeing North American, Inc. Thereafter the contract between Rockwell and DOE for management of Rocky Flats was amended to reflect the contractor's name change.

departs from the text of the statute and conflicts with the legal standards adopted in five other circuits.

The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing" the *qui tam* action. 31 U.S.C. § 3730(e)(4)(B). Stone faced a serious obstacle in establishing any first-hand knowledge of the fraud at issue because his employment was terminated more than a year before the events that gave rise to the jury's finding of liability. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). But the Court of Appeals interpreted the statute to mean that a relator needs only to have some background "knowledge 'underlying or supporting' the fraud allegation." Pet. App. 20-21a.

Applying that standard, it made no difference that Stone did not even claim to have direct knowledge of the only false statements and environmental violations that he actually sought to prove at trial. As Judge Briscoe explained, the "direct and independent knowledge possessed by" the relator in this case was so tangential that it "could have been omitted entirely at trial without affecting the outcome." Pet. App. 48a. Indeed, it was. Stone did not testify, and the document he highlighted as demonstrating his "original" information was never even introduced into evidence. Stone could not have recovered under the legal standards applied in other circuits and this Court should grant review to resolve this important circuit split.

This Court should also grant review to resolve whether the *qui tam* provisions of the FCA violate Article II. Both the Appointments Clause and the Take Care Clause bar Stone from litigating on behalf of the United States.

Procedural History

Stone was employed at Rockwell as an engineer until his employment was terminated in March of 1986. Pet. App. 3a. Two years after his departure, newspapers published detailed reports concerning environmental compliance problems at Rocky Flats associated with a solidified waste

called "pondcrete." Pet. App. 60a.[2] In May of 1988, several insolid pondcrete blocks were discovered on an outdoor pad where they were stored. Tr. 601-02, 631-32, 1124-25.[3] This prompted a canvass revealing "several thousand boxes" of insolid pondcrete. Tr. 636-38, 784-86.

In June of the following year, the Federal Bureau of Investigation ("FBI") executed a search warrant at Rocky Flats, and one month later, Stone filed his *qui tam* suit. Pet. App. 4a. Stone's complaint was scattershot, covering a broad range of issues and "contain[ing] little or no specification of the statements he believed were false." CA App. at 0921; *see also* Pet. App. 4-5a. At the conclusion of the Government's investigation, Rockwell pled guilty to ten environmental violations. Pet. App. 6-7a.

When Stone filed his complaint in 1989, he provided the Government with a statement that disclosed "substantially all [of his] material evidence and information," as mandated by 31 U.S.C. § 3730(b)(2). Pet. App. 6a; CA App. 0522. The United States thereafter examined all "the evidence in [its] files," CA App. at 0916, and found no "indication that Rockwell had made misrepresentations to DOE, or concealed its conduct from DOE, or otherwise committed fraud or submitted false statements to DOE." CA App. at 0921; *see also id.* at 0920, 0913 (Government "unable to ascertain that Mr. Stone had a viable False Claims Act case"). Accordingly, the Government filed a notice in March of 1992 declining to intervene. Pet. App. 6a.

In November of 1995, based on information discovered in a separate case, CA App. 0903-04, 0923-37, the Government

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[2] Pondcrete is formed by mixing "sludge and liquids retrieved from ... solar ponds" with Portland cement. Tr. 982. Glen Sjoblom, an expert with high-level experience at EPA, testified that this methodology "was generally accepted" as the proper way to handle such wastes, and was used by at least seven other DOE facilities. Tr. 4731, 4739.

[3] The trial transcript is cited herein as "Tr." The Appellant's Appendix before the Tenth Circuit is cited herein as "CA App." Appellee/Cross-Appellant James S. Stone's Supplemental Appendix before the Tenth Circuit is cited herein as "SA."

decided to intervene and, together with Stone, filed an Amended Complaint. Pet. App. 8-9a. The Amended Complaint asserted an FCA count based on the theory that Rockwell secured payments from DOE by making misstatements relating to and concealing problems with pondcrete. CA App. 0980-95.[4] Stone, but not the United States, asserted another FCA count charging concealment of plutonium contamination. Pet. App. 8-9a; CA App. 0998-1004. The district court ordered a separate trial on Stone's plutonium claim, Pet. App. 9a, which has not yet been scheduled. The pondcrete claim was tried to a jury. *Id.* Stone never testified at trial. On the verdict form, the jury was asked to determine liability under the FCA by answering questions corresponding to ten different claims for payment submitted between October 1, 1986 and December 30, 1989. *Id.* The answers established that the jury found that Rockwell violated the FCA with respect to three claims submitted between April 1987 and September 1988, but not with respect to the seven remaining claims. CA App. 1119-20.[5] The court entered judgment for both plaintiffs in the amount of $4,172,327.40. CA App. 1569.[6]

Proceedings Related To The Original Source Rule

Rockwell moved to dismiss Stone's claims under Section 3730(e)(4). CA App. 0116-35. Newspaper articles published

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[4] The Amended Complaint also charged concealment of "saltcrete" and "spray irrigation" problems. CA App. 0980-91. Counts II-V asserted various common law and contract claims. Pet. App. 8a.

[5] For all periods covering spray irrigation, the jury found for Rockwell. Pet. App. 50a. Stone conceded he was not an original source as to saltcrete. *Id.* Stone's right to remain in the case, accordingly, turned on his original source status as to pondcrete. *Id.* at 50-51a. The jury found that Rockwell did not breach its contract with DOE, and the court dismissed the remaining non-FCA claims with prejudice. *Id.* at 9-10a.

[6] The district court deferred Stone's motion for attorneys' fees pending appeal. Pet. App. 9a & n.2. Reversal of the judgment would, at a minimum, foreclose Stone's claim for over $10 million in attorneys' fees as a prevailing party. *See* 31 U.S.C. § 3730(d)(1) (prevailing party "shall" receive fees and costs).

before Stone filed his complaint in 1989 had alleged false statements and concealment of a wide range of environmental violations at Rocky Flats. CA App. 0232-52. Based on this record evidence, the district court squarely held that Stone's claims were based on "incidents that were widely covered in the news media," and that Stone could only proceed if he "satisf[ied] the 'original source' requirement." Pet. App. 60a. Stone did not challenge that finding on appeal.

The original source rule requires a relator both to know of and to disclose to the Government "the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). The district court held that Stone had satisfied his burden of proof but did not make any findings regarding Stone's direct knowledge about pondcrete.[7] The district court instead relied on Stone's awareness that Rockwell's compensation was tied in part to environmental compliance and on his allegation that he was generally "instructed not to divulge environmental ... problems to the DOE." Pet. App. 61a. The Tenth Circuit held that Stone had met his burden of proving that he was an original source of the claims that succeeded at trial because he knew and disclosed background information to the Government concerning pondcrete. Pet. App. 20a.

As described below, the Courts of Appeals are divided on the statutory standards for determining what a relator must know and disclose to the Government. Two circuits require knowledge of the fraudulent statement; two others require knowledge sufficient to show that the statement is false; and one evaluates whether the relator's information proximately caused the discovery of the fraud. In order to assess whether Stone could have prevailed under these

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[7] Rockwell renewed its motion after the jury verdict, and argued that Stone failed to prove that he was an original source with respect to his pondcrete allegations. Pet. App. 9a; CA App. 1153-54. The district court adhered to the prior ruling and denied Rockwell's motion with no findings specific to pondcrete. Pet. App. 14a, 64-65a, 67a.

standards, what Stone knew and disclosed to the Government, as well as the basis of Stone's claims, is summarized as follows.

1. Stone sought to prove his direct and independent knowledge through three documents: an affidavit filed with the district court, the Confidential Disclosure Statement he provided to the Government, and a one-page Engineering Order, dated 1982. Pet. App. at 17-20a. The Tenth Circuit relied on these documents to show that Stone had reviewed "a design for the process and mechanical system intended to be used for removing sludge from" the solar evaporation ponds and predicted "that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the 'pondcrete' blocks would rapidly disintegrate." CA App. 0509; Pet. App. 19a. Stone handwrote on the 1982 Engineering Order "[t]his design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation." Pet. App. 18a; CA App. 0439. The Court of Appeals construed this annotation as explicitly "articulating [Stone's] belief that the proposed design for making pondcrete was flawed." Pet. App. 18a.[8] This information, in turn, was found to "support[]" Stone's allegation that Rockwell "ultimate[ly]" made false statements about pondcrete some five years after he reviewed the Order. Pet. App. 21a.

The Court of Appeals further held that the 1982 Engineering Order, entitled "Solar Evap. Pond Sludge Removal," alone sufficed to "to carry Stone's burden" of establishing that he "voluntarily provided [his direct and

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[8] Although Stone's affidavit includes general statements that "the design proposed by Rockwell management for making pondcrete" was defective, the only specific defect identified was the system for piping sludge from the solar ponds. CA App. 0298. Moreover, Stone's Confidential Disclosure Statement, which by its own terms and by statutory mandate included "substantially all material evidence and information" Stone possessed, *see* 31 U.S.C. § 3730(b)(2); Pet. App. 6a; CA App. 0522, only described a defect in the piping system. CA App. 0509-10.

independent] information to the Government," within the meaning of Section 3730(e)(4)(B). Pet. App. 52a; CA App. 0439.[9] The Order was buried in 2,300 pages Stone produced to the FBI, and the 302 reports memorializing Stone's meetings with the FBI make no mention of either pondcrete or the Engineering Order. Pet. App. 73a; CA App. 0306, 0439.

2. Although the Tenth Circuit relied on Stone's information about predicted defects in the piping as the "bas[is]" of Stone's FCA claims, Stone never actually advanced that theory as a basis for liability in the case. (And the Tenth Circuit made no finding that he did.) The Amended Complaint did not allege that known defects in the piping system caused the blocks to fail. CA App. 0980-85. Nor did Stone's Statement of Claims. That filing listed "the facts establishing [Plaintiffs'] entitlement to a judgment in their favor," and asserted that Rockwell knew pondcrete was insolid because Rockwell employees *"reduce[ed] the amount of cement added to the blocks."* CA App. at 1080, 1084 (emphasis added).[10] Although the Statement of Claims also mentioned peripheral factors such as "inadequate process controls and inadequate inspection procedures," it alleged that the reduction in cement was the *"major*

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[9] Finding on appeal that the record contained insufficient "specific and pertinent findings-of-fact" to "support a conclusion whether the required disclosure was or was not made," the Tenth Circuit remanded for the limited purpose of determining whether Stone "satisfied the pre-filing disclosure prong." Pet. App. 22-23a. On remand, the district court found that Stone had timely submitted the 1982 Engineering Order to the government, but also found that the Order was insufficient because it did not mention pondcrete. Pet. App. 72-74a. The Tenth Circuit held that its earlier statement—that the 1982 Engineering Order "was explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed"—bound the district court as law of the case. Pet. App. 51-52a.

[10] The evidence at trial demonstrated that in the winter of 1986—more than eight months after Stone left Rocky Flats—a new foreman took over pondcrete production and substantially reduced the average quantity of cement used in the mix. Tr. 980-82, 1002-03, 1041, 1108-09.

contributor to the existence of insufficiently solid pondcrete blocks"—and never mentioned the defective "piping" that Stone relied upon to establish his status as an original source. CA App. at 1080, 1084 (emphasis added).

Nor did Stone introduce any evidence of defects in the piping system at trial. Instead, the evidence centered on Rockwell's decision to reduce the amount of cement—conduct that was specifically discussed in newspaper articles upon which, *inter alia*, the district court relied in finding that Stone's action was based upon allegations that had been publicly disclosed.[11] The evidence established that sludge and cement were not mixed in the piping system Stone critiqued, but rather in a "pug mill" that was not installed until 1985—three years after Stone made his prediction. Tr. 983-85; CA App. 1661. Not only did plaintiffs tell the jury that reductions in the amount of cement used caused the solidification problem, Tr. 5079, 5128, 5135, 5144, 5161, they affirmatively told the jury that the pondcrete system itself was *not* the cause. In closing, the Government told the jury that the first foreman to manufacture pondcrete at Rocky Flats "was able to get concrete hard pondcrete blocks using the same methods" that later foremen "used with the exception of *one thing, and that is the reduction of cement.*" Tr. 5177. And Stone did not even contest Rockwell's assertion on appeal that Stone "presented no evidence whatever about the piping that transmitted sludge from the solar ponds to the holding tank." Appellants' Opening Brief at 37 (Feb. 7, 2000).

3. As these facts make clear, the district court did not find that Stone had direct and independent knowledge of any false statements actually made by Rockwell. Nor did the Tenth Circuit purport to find any evidence in the record

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[11] Newspaper articles detailed not only the spill in 1988, but also the conclusion that "the ratio of concrete to waste was apparently altered," from "about 3.5 pounds of cement to 1 gallon of the sludge" to "closer to 1.8 pounds of cement to 1 gallon of sludge," thereby causing the spill. CA App. 889-38, 889-39, 889-40, 1342-45.

that Stone knew of the actual false statements—instead, the Tenth Circuit held as a matter of law that a relator need not know of "the actual act of fraud." Pet. App. 21a. And the record contained ample evidence that Stone did *not* know of any actual fraudulent statements. Plaintiffs told the jury that "the three years that are important to this case" were 1987-89—years when Stone never set foot inside Rocky Flats. Tr. 209; CA App. 0290-310; Pet. App. 3a. All of the environmental violations and concomitant false claims alleged by plaintiffs took place long after Stone's employment with Rocky Flats ended. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). Although Stone asserted that Rockwell supervisors ordered him not to "discuss[] any environmental problems at Rocky Flats with the DOE," Pet. App. 19-20a, this statement was allegedly made in 1981—*six years* before the alleged concealments at issue in this case—at an isolated meeting with three individuals who appear to have had nothing to do with pondcrete (none of them was even mentioned at trial). Moreover, Stone admitted that he did not know of any documents containing false statements, nor of any persons who had concealed environmental issues or made false statements. CA App. 0225-26, 0230-31. When asked in his deposition for instances in which Rockwell misstated or concealed its compliance with environmental requirements, Stone described a single incident involving a cooling tower, and "[could not] remember any" others. CA App. 0230.

4. The district court also did not find that Stone had direct and independent knowledge that pondcrete blocks stored at Rocky Flats were actually insolid. Stone could not have known whether the pondcrete blocks stored at Rocky Flats between April 1987 and September 1988 were solid because he had left Rocky Flats before those blocks were manufactured. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). Nor could he have known that Rockwell would use an inadequate ratio of concrete—the alleged cause of the insolid pondcrete—because that did not occur until there was a personnel change months after Stone's

departure. *Id.*; Tr. 1002-03, 1108-09. The Court of Appeals held that Stone satisfied the original source rule based on his prediction "that a defective pondcrete manufacturing process *would be* employed." Pet. App. 21a (emphasis added). And the Court of Appeals deemed "immaterial" the fact that Stone never even tried to prove at trial that his prediction was the actual cause of "solidity defects in the pondcrete blocks." *Id.*

5. The district court also made no finding that Stone proximately caused the Government's discovery of the alleged false claims. Nor did the Tenth Circuit. Although the Court of Appeals stated that Agent Lipsky used "information he had learned from Stone," Pet. App. 4a, to secure a search warrant, there was no evidence or finding that the information was central to the Government's discovery of the pondcrete problems. Agent Lipsky's 302 reports show that Stone focused on incineration charges, which Lipsky repeated in his affidavit. CA App. 145, 458, 461-62, 469, 778-87. The Government later determined that the incineration charges were meritless. CA App. 788, 803-04. And Lipsky relied far more heavily on information drawn from other informants, public records, and the Government's own independent investigations. *See* Lipsky Aff. ¶¶ 1.4, 1.20, 6.3, 7.20-22, 8, *attached to* Defendant's Motion in Limine (Nov. 10, 1997). Moreover, the record demonstrates that the Government did not, at the time, view Stone as a whistleblower. In a statement after the FBI raid, the United States Attorney who led the investigation said that the Rocky Flats case was unusual because "at no time ... did any knowledgeable 'insider' come forward." CA App. 0832. "Almost always," he explained, "someone eventually 'cracks' and steps forward to provide an 'insider's' cooperation. That simply did not happen here." *Id.* Instead, the Government discovered the facts through its own efforts, "stringing together thousands of documents to create inferences of criminality." *Id.* The day after the raid, newspapers reported that an unnamed DOJ source said "[n]o 'whistle blower' was involved" and "the investigation

didn't result from any 'single ... source.'" CA App. 0234. The DOJ attorney who led the plea bargain negotiations later told Congress that "candidly ... in the criminal investigation we found the information that [Stone] supplied to have very limited usefulness." Additional Record on Remand filed April 24, 2002, Tab 3(A), at 3[illegible].[12] In discovery, Stone identified 48 individuals with relevant knowledge, CA App. 1232-80, not one of whom testified at trial. Of the 55 witnesses who did testify, none even mentioned Stone's name.

Proceedings On Appeal

1. The Tenth Circuit affirmed, holding "that Stone has adequately established himself as having direct and independent knowledge of his allegation that Rockwell manufactured insolid pondcrete." Pet. App. 22a. The Tenth Circuit analyzed Section 3730(e)(4) as merely requiring relators to know facts "underlying or supporting" the "fraud allegations contained in the plaintiff's *qui tam* complaint." Pet. App. 21a. The Tenth Circuit expressly held that a relator need not have direct and independent knowledge of "the actual submission of inaccurate claims." Pet. App. 21a. Moreover, the Tenth Circuit did not require that a relator have direct and independent knowledge of facts sufficient to prove that claims submitted by a defendant were inaccurate. Instead, the Tenth Circuit found that Stone qualified as an original source based merely on his prediction that Rockwell "*would be* using a defective process for manufacturing pondcrete," irrespective of whether the problem Stone

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[12] Although the Government advised the district court that it would "not challenge Mr. Stone's status pursuant to 31 U.S.C. § 3730(e)(4)," SA 26, it had previously advised the district court that Stone's statement of "all material evidence and information" in his possession was insufficient to demonstrate a viable FCA claim. CA App. 0903-04, 0913, 0916, 0920-21, 0923-37. In support of its motion to intervene, the Government advised the district court that discovery elicited by the Government in a separate action, principally testimony from other Rocky Flats employees "obtained [by the government] for the first time subsequent to March 1992," was what revealed an FCA claim. CA App. at 0926-32, 0936.

predicted "actually caused the production of malformed blocks." Pet. App. 21-22a (emphasis added).

Judge Briscoe concurred in part and dissented in part. Pet. App. 44a. Characterizing the majority's rule as requiring only "background knowledge," *id.*, she noted that "there is *no evidence* that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or Rockwell's efforts to conceal those problems from the DOE. Indeed, *Stone was terminated from his employment with Rockwell well before either event occurred.*" *Id.* at 46a (emphasis added). And Stone's predictions were insufficient, in Judge Briscoe's view, because "it is not Rockwell's decision to go forward with the proposed manufacturing process that gave rise to the ... FCA claims. Rather, [those] claims are based on Rockwell's concealment of actual problems that arose after the manufacturing process began." *Id.* at 47a & n.2. As evidence of Stone's ignorance, Judge Briscoe pointed out that "the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome." *Id.* at 48a. Because Stone "lacked direct and independent knowledge of any of the essential elements" of his FCA claims, she concluded, he could not qualify as an original source. *Id.* at 47a.

2. With respect to Article II,[13] the Tenth Circuit reasoned that the Appointments Clause imposes only "procedural requirements" governing the appointment of officers, and that because Stone did not draw "a government salary" he was not an "officer." *Id.* at 24-26a. With respect to the Take Care Clause, the Tenth Circuit held that the Executive retains sufficient control to avoid constitutional infirmity where, as here, the Government was permitted to

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[13] Rockwell raised its Article II arguments in its Answer, CA App. 1460, and again in a motion to dismiss after the jury's verdict. CA App. 1459-71. In its motion, Rockwell sought dismissal of all of Stone's claims. CA App. 1460, 1471. The district court denied that motion in its entirety. Pet. App. 67a.

intervene. *Id.* at 26-29a.

3. Rockwell twice petitioned for rehearing *en banc*. In response to Rockwell's first petition, the panel granted rehearing and remanded for further fact finding. Pet. App. 49a. Rockwell's second petition was denied by an evenly divided vote, with Chief Judge Tacha, Judge Kelly, Judge Briscoe, Judge O'Brien, and Judge McConnell voting for *en banc*. Pet. App. 57a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision deepens an existing circuit split regarding the proper interpretation of the original source rule, conflicts with this Court's reading of similar statutory language, and effectively eviscerates the jurisdictional bar of Section 3730(e)(4). The statute expressly requires a relator to be the original source of the factual information on which the FCA allegations are "based." As this Court held in *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993), when construing the same term in the Foreign Sovereign Immunities Act, the "basis" of an action refers to "the 'gravamen' of the complaint," meaning "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 356-57. And there can be no doubt that the "gravamen" of an FCA claim consists of allegations that the defendant knowingly made statements or claims that did not reflect the true state of affairs. *See, e.g.*, John T. Boese, 1 Civil False Claims and *Qui Tam* Actions § 2.03[B] (3d ed. 2006). An FCA claim accordingly could not possibly be "based" on the relator's information, within the ordinary meaning of that term, unless the relator had "direct and independent knowledge" of the false claims made by the defendant. In the Tenth Circuit, however, a relator need only know background information "underlying or supporting" the fraud allegation, and the relator's "information" can even be wrong and irrelevant. Pet. App. 21a. That view cannot be reconciled with *Nelson*, where this Court squarely rejected the view that a claim could be "based" on acts that only had some causal "connection with, or relation to" the elements of the

claim. 507 U.S. at 357-58. And it conflicts with the standards adopted by five other circuits. This Court should grant review to resolve a deep and well-developed circuit split, and to prevent an expansion of the *qui tam* provisions that is unsupported by the text of the FCA.

Independently, this Court should grant review to decide whether the *qui tam* provisions violate Article II of the Constitution. This Court reserved that question in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and it is time to resolve it. By vesting the authority to initiate and maintain litigation on behalf of the United States with a self-appointed relator, the FCA violates the Appointments Clause as construed by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). And by vesting such discretion in a relator whom the Executive cannot dismiss, the FCA violates the Take Care clause as construed by this Court in *Morrison v. Olson*, 487 U.S. 654 (1988).

I. THE TENTH CIRCUIT'S JUDGMENT DEEPENS AN EXISTING CIRCUIT SPLIT AND EFFECTIVELY EVISCERATES § 3730(e)(4)

A. The Tenth Circuit's Interpretation Of The Governing Standard Conflicts With The Interpretations Adopted By The Third, Eighth, Ninth, Eleventh, And D.C. Circuits

The lower courts are in deep disarray on the question of how to define the nature and quantum of "knowledge" a *qui tam* relator must possess in order to qualify as an "original source" of the "information" that forms the "bas[is]" for the claims at issue. The Third and Eleventh Circuits require relators to know of an actual false statement to the Government. The Ninth Circuit requires relators to know of a false statement or at least to have been a proximate cause of the Government's discovery of a false statement. And the Eighth and D.C. Circuits require relators to know the actual facts that made a statement false. Stone would not have qualified as an original source in any of these circuits. But the Tenth Circuit only requires a relator to know

background information "underlying or supporting" his supposition that a defendant might have engaged in fraud, even if the relator pursues a different theory at trial.

1. In *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) (Alito, J.), the Third Circuit held that an "original source" is one who knows of the alleged fraud. Mistick was a construction company that remediated lead-based paint pursuant to specifications issued by the Pittsburgh Housing Authority. *Id.* at 379. The Housing Authority's specification required use of a product called "Glid-Wall," manufactured by Glidden, to cover the lead paint. *Id.* Glidden, however, "had begun recommending against the use of [Glid-Wall] for this purpose some time earlier." *Id.* Mistick's *qui tam* action charged the Housing Authority with concealing this information from HUD, in order to procure additional remediation funds from HUD when Glid-Wall failed. *Id.* at 381-82.

Mistick was an insider for much of the relevant conduct. Mistick was the "general contractor for all of" the work at issue and company representatives attended a meeting with the Housing Authority when Glidden disclosed that Glid-Wall was unsuitable for this purpose. *Id.* at 379. Mistick also undertook its own independent investigation. *Id.* at 381. Nevertheless, the Third Circuit found that Mistick did not qualify as an original source because it did not know "that the Authority had made the alleged misrepresentations to HUD." *Id.* at 388. The Third Circuit held that, to be an "original source," a relator must have "'direct and independent knowledge' of the most critical element of its claims, *viz.*," the misrepresentation itself. *Id.* Construing a prior decision that held "'it is not necessary for a relator to have all the relevant information in order to qualify,'" the court concluded that "a relator cannot be said to have 'direct and independent knowledge of the information upon which [its fraud] allegations are based,' 31 U.S.C. § 3730(e)(4)(B), if the relator has no direct and independent knowledge of the allegedly fraudulent

statements." *Id.* at 389 (quoting *United States ex rel Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir 1991)).[14]

The Eleventh Circuit has adopted a similar interpretation. In *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 564-65 (11th Cir. 1994), the *qui tam* relator charged that an insurance company systematically charged Medicare for claims that Medicare had no obligation to pay. The relator held a policy with Blue Cross, had himself been subject to the challenged practice and knew that his own medical bills had been forwarded to Medicare for payment in violation of the law. *Id.* at 564-65. The Eleventh Circuit held Cooper to be an original source because his "information is potentially specific, direct evidence of fraudulent activity." *Id.* at 568 n.12. The Eleventh Circuit distinguished Cooper from a relator who possessed mere "background information which enables him to understand the significance of a more general public disclosure." *Id.* (citing *Stinson*, 944 F.2d at 1160).

The Tenth Circuit's decision irreconcilably conflicts with *Mistick* and *Cooper*. The Tenth Circuit rejected as "flawed" Rockwell's argument that "a relator must have direct and independent knowledge of the *actual* fraudulent submission

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[14] Stone argued below that he would qualify as an original source in the Third Circuit under *Stinson*. *See, e.g.*, Appellee/Cross-Appellant James S. Stone's Opening/Response Brief at 45 (Mar. 17, 2000). *Mistick* demonstrates Stone's error. Moreover, *Stinson* made clear that a "relator must possess *substantive information about the particular fraud* rather than *merely background information* which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." 944 F.2d at 1160 (emphasis added). And district courts within the Third Circuit have applied *Mistick* and *Stinson* to disqualify relators who "have direct and independent knowledge of *some* of the elements of" their claim but not "the most critical elements." *See, e.g. United States ex rel. Waris v. Staff Builders, Inc.*, No. CIV. A. 96-1969, 1999 WL 788766 at *1-2, *8 (E.D. Pa. Oct. 4, 1999) (relator not original source, even though he saw false invoices and inferred they would be submitted for reimbursement by Medicare, because "the mere existence of a false invoice is insufficient to make out a claim of fraud").

to the government." Pet. App. 20a. While *Mistick* required a relator to know of "the allegedly fraudulent statements," 186 F.3d at 389, and *Cooper* requires "specific, direct evidence of fraudulent activity," 19 F.3d at 568 n.12, the Tenth Circuit held that a "relator need not ... have in his possession knowledge of the *actual* fraudulent conduct itself; knowledge 'underlying or supporting' the fraud allegation is sufficient." Pet. App. 21a. And Stone could not have prevailed under *Mistick* or *Cooper*. As Judge Briscoe observed in dissent, "Stone lacked direct and independent knowledge of *any of the essential elements* of the" FCA claim. Pet. App. 47a (Briscoe, J. concurring in part, dissenting in part). Stone at most had the "background information" that *Cooper* found inadequate.[15] "[T]here is no evidence" that Stone knew that Rockwell concealed pondcrete problems from DOE or claimed payment for environmental compliance it had not achieved. *Id.* at 46a. Indeed, *Stone left Rocky Flats before any such misrepresentations occurred. Id.* As Judge Briscoe noted, "the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome of the" FCA claims, *id.* at 48a, and in fact Stone did not testify at trial nor was his 1982 Engineering Order introduced into evidence. Moreover, because Section

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[15] Stone argued below that his general knowledge of the DOE award fee process, coupled with a single incident in 1981 in which his Rockwell superiors told him not to discuss environmental problems with DOE, allowed him to infer that Rockwell submitted false claims to DOE in 1987-88. *See* Appellee/Cross-Appellant James S. Stone's Opening/Response Brief at 41-43, 47 (Mar. 17, 2000). The Tenth Circuit did not adopt this theory, and held that Stone did not need to know of "the actual submission of inaccurate claims by Rockwell to DOE." Pet. App. 21a. Stone's inference would not satisfy *Mistick* in any event. The relator in *Mistick* attended the meeting where Glidden told the government contractor that the specified product would fail, and Mistick knew that HUD was reimbursing lead paint remediation work. 186 F.3d at 379. The fact that the relator in *Mistick* could draw an inference that the product defects had not been disclosed to HUD was insufficient. And Stone's own knowledge fell far short of Mistick's.

3730(e)(4)(B) requires a relator both to know of *and to disclose* "the information on which the allegations are based," the Tenth Circuit diverged from the Third and Eleventh Circuits when it held that disclosure of Stone's 1982 Engineering Order sufficed to "carry Stone's burden" on voluntary disclosure. Pet. App. 52a. The Engineering Order nowhere identified or even predicted any fraudulent statements.

Stone's inability to direct the Government's attention to his pondcrete information further demonstrates his lack of sufficient knowledge. If Stone had understood the pondcrete issue at the time, he would have been able to explain it to Agent Lipsky, yet Agent Lipsky's 302s make no mention of pondcrete. Pet. App. 73a. Stone also would have been able to explain the significance of the engineering order—yet no evidence suggests he did so. *Id.* Stone, of course, bore the burden of proof to establish that he was an "original source." Pet. App. 12a.

2. The Ninth Circuit also requires a relator to have "firsthand knowledge of the alleged fraud." *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525 (9th Cir. 1998). The Ninth Circuit does not permit a relator to qualify merely based on "speculation or conjecture" that a defendant might have committed fraud. *Id.* at 526. Stone's prediction that the pondcrete design he reviewed would fail is precisely the sort of "speculation or conjecture" that does not suffice in the Ninth Circuit. *See* Pet. App. 47a (Briscoe, J. concurring in part, dissenting in part) (citing *Aflatooni* to demonstrate that "although Stone predicted that problems would occur with the production of pondcrete, and perhaps may have speculated that Rockwell would conceal any such problems from the government," he did not qualify as an original source). Stone conceded that he lacked direct and independent knowledge of fraudulent statements. CA App. 0225-26, 0230-31.

The Ninth Circuit recognizes a limited exception where a relator "trigger[s]" a Government investigation that uncovers the fraud. *See Seal 1 v. Seal A*, 255 F.3d 1154, 1162

(9th Cir. 2001). A relator's status as an original source under this exception is governed by proximate cause concepts: "(1) the degree to which the relator's information helped uncover the later allegations; (2) the degree to which other private actors helped uncover those allegations; (3) the degree to which the government played a role in uncovering those allegations; and (4) whether the later allegations are brought against the same entity as the earlier allegations." *Id.* at 1163. In *Seal 1*, the Ninth Circuit disqualified a relator who triggered a government investigation because "others provided substantial assistance to the government along the way" and the Government itself "played a significant role in uncovering the allegations." *Id.* at 1163.

The very same analysis would have disqualified Stone. First, the Tenth Circuit did not apply the *Seal 1* factors and the district court did not—indeed, could not—make the findings necessary for Stone to prevail under *Seal 1*. Stone never proved that he triggered the investigation that uncovered the pondcrete problems—quite to the contrary, contemporaneous newspaper coverage showed that Rockwell reported its pondcrete spill, triggering a state and federal investigation. CA App. 889-38, 889-39, 889-40, 1342-45. Moreover, other private entities (Rockwell itself, local newspapers, and other unnamed informants) provided substantial assistance to the Government. And the Government played a significant role as well. *See* Additional Record on Remand at tab 3(A), filed April 24, 2002; CA App. 0832; Lipsky Aff. ¶ 1.4, 1.20, 6.3, 7.20-22, 8, *attached to* Defendant's Motion in Limine, Nov. 10, 1997. On such facts, *Seal 1* also would have barred Stone's claim had this case been litigated in the Ninth Circuit.

3. The D.C. and Eighth Circuits do not require relators to know of the fraudulent statements—instead, they only require knowledge of facts sufficient to show that statements made to the Government were false. In *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 647 (D.C. Cir. 1994), the D.C. Circuit held that

an "original source" is one who has direct and independent knowledge of an essential element of the fraud. Quinn was an arbitrator, appointed by the National Mediation Board to resolve a labor dispute involving Springfield. Upon reviewing Quinn's time vouchers, Springfield realized that "Quinn had no arbitral function to perform on several of the days for which he sought pay." *Id.* Springfield brought a *qui tam* action, charging Quinn with false billing claims. *Id.* The D.C. Circuit interpreted the statutory language to require "direct and independent knowledge of" one of the "essential element[s] of the underlying fraud transaction.' *Id.* at 657. Applying that standard, the Court held that Springfield was an original source because it "had direct and independent knowledge of *essential* information" sufficient to establish the core element of falsity. *Id.*

The Eighth Circuit adopted the same interpretation of the statute in *Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002). Anesthetists brought a *qui tam* claim, charging that anesthesiologists were improperly billing Medicare for work performed by anesthetists. *Id.* at 1050. The Eighth Circuit held that a relator must have "direct knowledge of the true state of the facts." The anesthetists qualified, because they had themselves performed the work for which the anesthesiologists billed, and had had directly observed "anesthesiologist[s] filling out forms used for billing." *Id.*

The standard adopted in this case irreconcilably conflicts with *Springfield* and *Nurse Anesthetists*. The Tenth Circuit did not even purport to find that Stone had direct knowledge of essential information sufficient to establish the element of falsity, as required in the D.C. and Eighth Circuits. That is precisely why Judge Briscoe dissented. *See* Pet. App. 47a (Stone "lacked direct and independent knowledge of any of the essential elements" of his FCA claims). As the Tenth Circuit's analysis makes plain, Stone's knowledge was hardly "essential" to the proof of his claims—the standard used to assess the sufficiency of knowledge in *Springfield*. 14 F.3d at 647. Indeed, the

majority did not quarrel with Judge Briscoe's observation that Stone's information "could have been omitted entirely at trial without affecting the outcome of the" FCA "claims." Pet. App. 48a. And the Tenth Circuit squarely held that Stone's speculation about design flaws in the pondcrete system was sufficient, regardless of whether those alleged flaws "actually caused the production of malformed pondcrete blocks." Pet. App. 22a. The Tenth Circuit's holding that Stone's production of his 1982 Engineering Order met his burden of voluntary disclosure, Pet. App. 52a, also conflicts with the law of the D.C. and Eighth Circuits. If a relator must *know* an "essential element of the underlying fraud transaction," *Springfield*, 14 F.3d at 657, then he also must adequately *disclose* an essential element. Stone did neither.

4. Instead of any of these approaches, the Tenth Circuit adopted a rule divorced from the statutory text that disserves the intended function of the original source rule. Congress sought to incentivize "whistle-blowing insiders with genuinely valuable information," *Springfield*, 14 F.3d at 649, *i.e.*, the "private individuals who are aware of fraud being perpetrated against the Government." H.R. Rep. No. 99-660, at 23 (1986). But the Tenth Circuit now permits relators to qualify without actually knowing of any fraud, or even having any *accurate* knowledge about the defendant's underlying conduct, Pet. App. 20-22a, and without disclosing information evidencing actual fraud or the true state of affairs at the time the statements were made. Pet. App. 52-53a. The statutory requirement that a relator must "have direct and independent knowledge of the information" that forms the "bas[is]" for the fraud claim cannot reasonably be read to allow relators to drain millions of dollars from the federal treasury based only on speculation about the future. In addition, the relator here was allowed to establish liability by relying on the facts that were publicly disclosed—the change in the cement/sludge ratio—even though Stone never even claimed to have direct and independent knowledge of those facts. Congress surely did

not intend to permit relators to rely on one set of facts to establish their status as an original source and then turn around and rely on different facts derived from public sources to prove their claim. Yet the Tenth Circuit's loose legal standard permitted that very type of bait and switch in this case.

Not only does the Tenth Circuit's rule allow relators to siphon away the Government's recovery, it also eviscerates Section 3730(e)(4)'s function as a bulwark against abusive *qui tam* lawsuits. *Qui tam* lawsuits are regularly brought by disgruntled ex-employees. Boese, 1 Civil False Claims and *Qui Tam* Actions § 4.01[B][2]. And "[m]ore and more *qui tam* cases are being brought by a defendant's competitor [or] employees of the defendant's competitors." *Id.* at § 4.01[B][3]. The potential for abuse in each situation is obvious. Properly construed, Section 3730(e)(4) would serve as a bar to abusive *qui tam* suits, by requiring relators to actually know about fraud. The Tenth Circuit's rule merely requires speculative beliefs "underlying or supporting" the view that fraud may have occurred. The Tenth Circuit's decision thus gives vindictive ex-employees or unscrupulous business competitors license to use the FCA, and a lawsuit in the name of the United States, merely "to gain a competitive advantage over the defendant." *Id.*

B. There Is No Reason To Defer Review

The issues presented here have been analyzed in the Courts of Appeals for over a decade, and clear conflicting positions have been staked out by the Third, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. This Court can thus interpret the original source rule with the benefit of considerable analysis from the courts below, a developed record, and with an awareness of the wide range of fact patterns to which the FCA and the original source rule can be applied. And the issues raised in this case strike at the very core of the original source rule. This Court recently denied a petition that focused solely on the meaning of the words "direct" and "independent" in Section 3730(e)(4)(B). *See, e.g., Comstock Res., Inc. v. Kennard*, 125 S. Ct. 2957

(2005). This case goes further, including the antecedent question of "*what* the relator must know firsthand." Brief for the United States as Amicus Curiae at 12-13, *Comstock Res., Inc. v. Kennard*, 543 U.S. 923 (2004) (No. 04-165) (emphasis in original). Analysis of the words "direct" and "independent" alone will be of limited significance because most if not all relators will have firsthand knowledge of *something* related to their claims.

Finally, further percolation promises only to increase confusion in the lower courts. Section 3730(e)(4) has given rise to at least two other circuit splits. The circuits are divided on the question of whether the phrase "the information on which the allegations are based" in Section 3730(e)(4)(B) refers to the allegations in the relator's complaint,[16] or the allegations in the public disclosure.[17] If this Court were to hold the latter, Stone would not qualify as an original source. *See* Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part); CA App. 0889-38 to 40, 0892, 1343-45. The circuits are also split on the voluntary disclosure prong of Section 3730(e)(4)(B), with some holding that a relator must have been a source of information to the entity that made the public disclosure,[18] others holding that the relator must have provided his information to the

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16 *See United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990); *Mistick*, 186 F.3d at 388-89; *United States v. Bank of Farmington*, 166 F.3d 853, 864-65 (7th Cir. 1999); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 409 (9th Cir. 1993); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999).

17 *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003) (acknowledging circuit split); *United States ex rel. McKenzie v. BellSouth Telecoms.*, 123 F.3d 935, 943 (6th Cir. 1997); *Nurse Anesthetists*, 276 F.3d at 1048; *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997).

18 *Dick*, 912 F.2d at 16 (2d Cir. 1990); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992).

Government prior to the public disclosure,[19] and still others holding that the relator need only disclose his information to the Government prior to filing his complaint.[20] In the process of resolving the question presented in this case, this Court would invariably provide guidance that would help clarify this confused body of law.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE QUESTION RESERVED IN *STEVENS*—WHETHER THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT VIOLATE ARTICLE II

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000), this Court reserved "the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take care' Clause of § 3." This case presents that question which this Court should grant review to resolve.

A. The *Qui Tam* Provisions Of The False Claims Act Violate The Appointments Clause

Section 3730(b) authorizes *qui tam* relators to bring civil actions "for the United States Government." 31 U.S.C. § 3730(b). But in *Buckley v. Valeo*, 424 U.S. 1, 140 (1976), this Court unequivocally held that the Appointments Clause of the Constitution prohibits the vesting of "primary responsibility for conducting civil litigation ... for vindicating public rights" in persons not appointed in the manner prescribed by that Clause. The *qui tam* provisions of the FCA do precisely what *Buckley* forbids. Section 3730 provides that if the Government intervenes, "it shall have the primary responsibility for prosecuting the action." 31 U.S.C. § 3730 (c)(1). But, in every case, the statute vests in the relator "the right to conduct the action" unless and until the Government intervenes. 31 U.S.C. § 3730 (c)(3)

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[19] *McKenzie*, 123 F.3d at 942 (6th Cir. 1997); *Findley*, 105 F.3d at 690.

[20] *Bank of Farmington*, 166 F.3d at 865; *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1352 (4th Cir. 1994).

Assistant Attorney General William P. Barr determined in 1996 that these provisions "plainly violate the Appointments Clause." 42 Op. Off. Legal Counsel 207, 221 (1989) ("Barr Op."), *superseded by* 20 Op. Off. Legal Counsel 124 (1996) (Dellinger, W.). The Tenth Circuit disagreed, taking refuge in empty formalism by arguing that because relators do not collect a Government paycheck or receive the other benefits of office, they are not officers. Pet. App. 24-26a. That analysis directly contravenes *Buckley*, and strips the Appointments Clause of its structural significance.

In this case, Stone exercised primary responsibility for conducting civil litigation on behalf of the United States. He arrogated to himself the authority to file on behalf of the United States, without the advice and consent required by the Appointments Clause. Initiating *qui tam* suits can prematurely disclose criminal investigations, complicate plea agreements, cut off informal dispute resolution, and otherwise complicate the Executive's litigation strategy. *See* Barr Op. at 217. And here, the Government did not intervene for six years, leaving Stone with primary responsibility for the litigation for over half a decade. Pet. App. 6-8a. Even after intervening, the Executive expressly elected not to support Stone's plutonium claim—but Stone was permitted to pursue it nonetheless. *Id.* at 8-9a.[21] Moreover, even on their joint claims, Stone effectively led the litigation—deposing and examining almost half of the witnesses and driving the pre- and post-trial motions practice. Stone thus exercised the function of an officer of the United States.

The Tenth Circuit ignored these trenchant facts, reasoning that the Appointments Clause merely sets forth "procedural requirements" that "only apply to the appointment of officers." Pet. App. 25a. In so doing, the

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[21] Rockwell's Article II motion covered all of Stone's claim. CA App. 1460, 1471. The motion was denied *in toto*. Pet. App. 67a.

Tenth Circuit misinterpreted the governing law.[22] The Appointments Clause has a substantive role to play in "prevent[ing] congressional encroachment upon the Executive and Judicial Branches" and in "ensur[ing] public accountability." *Edmond v. United States*, 520 U.S. 651, 659-60 (1997). It "is more than a matter of 'etiquette or protocol'" but rather "is among the significant structural safeguards of the constitutional scheme." *Id.* at 659 (quoting *Buckley*, 424 U.S. at 125). The rationale for the Appointments Clause is not simply to make sure that federal salaries and benefits are not paid to the wrong parties—it is to protect the separation of powers and to ensure Government accountability by regulating who may exercise significant governmental authority. *See Buckley*, 424 U.S. at 126; *Edmond*, 520 U.S. at 659-62. The *qui tam* statute "allows Congress to circumvent" the check of an accountable Executive "and have its laws enforced directly by its own private bounty hunters." Barr Op. at 211.

Having recognized the obvious—that *qui tam* relators do not draw a federal paycheck—the Tenth Circuit was thus obliged to determine whether a relator was constitutionally permitted to prosecute FCA claims on behalf of the United States. Had it carried the analysis to its completion as required under *Buckley* and *Edmond*, the Tenth Circuit would have been compelled to hold that the FCA's *qui tam* provisions violate the Appointment Clause. Not only does the Tenth Circuit's decision directly conflict with *Buckley*, it invites end-runs around the Appointments Clause by the simple expedient of withholding federal paychecks and benefits from those to whom Congress purports to delegate

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[22] The Tenth Circuit's reliance on *United States v. Germaine*, 99 U.S. 508, 511–12 (1879), and *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) stood *Buckley* on its head. *Germaine* and *Auffmordt* held that a person's status may be discerned by examining such factors as "tenure, duration, emolument, and duties." 99 U.S. at 511-12. But *Buckley* instructs that it *is precisely because relators are not officers* that they may not exercise "significant authority" to litigate on behalf of the United States. *Buckley*, 424 U.S. at 126, 140.

executive power. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 768 (5th Cir. 2001) (*en banc*) (Smith, J., dissenting). Other circuits have made the same error.[23] This Court should grant review to resolve the conflict with *Buckley* and *Edmond*, and to restore the integrity of the Appointments Clause.

B. The *Qui Tam* Provisions Of The False Claims Act Violate The Take Care Clause

Morrison v. Olson, 487 U.S. 654 (1988), instructs that the President must retain substantial control over any person charged with executive functions. Like the Appointments Clause, the Take Care Clause serves the values of separation of powers and public accountability and prohibits Congress from insulating any aspect of executive authority from the President's control. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). The touchstone inquiry is whether the Executive Branch retains "sufficient control over [the person] to ensure that the President is able to perform his constitutionally assigned duties." *Morrison*, 487 U.S. at 696. The *qui tam* provisions of the FCA violate these principles, creating "self-appointed 'ad hoc deputies' who are largely beyond the supervision of the United States and for whose actions the United States is not accountable." *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 869 (8th Cir. 1998) (Panner, J., dissenting). The Tenth Circuit, however, held that because the Executive was permitted to intervene (six years into the litigation), the Take Care Clause was satisfied. Pet. App. 26-27a.[24] In this respect, the Tenth Circuit's judgment conflicts with *Morrison*.

A *qui tam* relator exercises significant executive authority by initiating and maintaining litigation on behalf

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[23] *Riley*, 252 F.3d at 757–58; *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758 n.21 (9th Cir. 1993).

[24] Three other circuits have also concluded that the *qui tam* provisions of the FCA comport with the Take Care Clause. *Riley*, 252 F.3d 749; *Taxpayers Against Fraud*, 41 F.3d 1032; *Kelly*, 9 F.3d 743.

of the United States. Initiating suit on behalf of the Unite States is entirely under the relator's control: the Executiv has no say in choosing the relator, in drafting the complaint in selecting the venue, or in deciding the appropriate time t file. *See* 31 U.S.C. § 3730(b)(1), (2). Such timing and tactica decisions, however, are core questions of prosecutoria discretion. *See* Barr. Op. at 217-18 (giving examples of case in which Executive was concretely injured by premature initiation of suit by *qui tam* relators); *see also Stinson*, 94 F.2d at 1164 (Scirica, J. dissenting). Under the FCA, a *qu tam* relator can act where the Executive has chosen not to with no duty to "follow Department of Justice ("DOJ" policies" and "no fiduciary or other duties to" the Unite States. *Riley*, 252 F.3d at 761–62 (Smith, J. dissenting).

If, as happened here for six years, the Government doe not intervene, then the relator retains unbridled discretio to make every litigation decision in his best interest without regard to the public interest. *See* 31 U.S.C § 3730(c)(3); *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939, 949 (1997) ("[Q]*ui tam* relators ar ... motivated primarily by monetary reward rather than th public good ... [and] are thus less likely ... to forego a action arguably based on mere technical noncompliance .. that involved no real harm to the public fisc."); Barr Op. a 220 (*qui tam* suits interfere with government contractin decisions); *id.* at 219 (relator incentivized to trad concessions on *qui tam* claims for concessions on hi personal claims, "since he receives only a fraction of an payment" made pursuant to *qui tam* claims).

Even where the Executive intervenes, the relato remains a party with autonomy to act contrary to th Executive's litigation strategy. *See* 31 U.S.C. § 3730(c)(1) *see* S. Rep. No. 345, 99th Cong., 2d Sess., at 25–26 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290–91 (*qui tam* plaintiffs intended to act "as a check that the Governmen does not neglect evidence, cause undue delay, or drop a fals claims case without legitimate reason."). As the Bar Opinion noted, relators often exercise this power "in way

adverse to the government's interest." Barr. Opp. at 218. Here, Stone continued to press a claim the Executive disapproved. Pet. App. 8-9a. While the Executive may petition for restrictions on the relator, he cannot oust the relator altogether without dismissing the entire action. 31 U.S.C. § 3730(c)(1-2(A)); Barr Op. at 219. And the Executive may not prevent the relator from objecting to the settlement or dismissal of the complaint. *See* 31 U.S.C. § 3730(c)(2); Barr Op. at 219. These restrictions are far from trivial—in several reported cases, a relator's objections to a proposed settlement created enormous obstacles for the Executive to carry out its objectives. *See, e.g., United States ex rel. Coughlin v. IBM*, 992 F. Supp. 137, 142 (N.D.N.Y. 1998); *United States ex rel. Burr v. Blue Cross & Blue Shield of Fla., Inc.*, 882 F. Supp. 166, 169 (M.D. Fla. 1995). And in at least one instance, the Court rejected the Government's proposed settlement based upon the objections of the relator. *See Gravitt v. Gen. Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio 1988); Barr Op. at 219.

None of the features that saved the Ethics in Government Act are present here. The independent counsel provisions authorized the Government to remove counsel for "good cause," *see Morrison*, 487 U.S. at 696, whereas the FCA does not permit the Executive to remove a relator without dismissing the entire action. The decision whether to appoint an independent counsel was committed to the Attorney General's "unreviewable discretion," *see id.*, whereas a relator appoints himself without any obligation even to consult the Executive first. An independent counsel's jurisdiction was "defined with reference to the facts submitted by the Attorney General," *id.*, whereas the relator may assert any allegations he chooses and pursue any course in the litigation that he best sees fit. Finally, an independent counsel was required to abide by DOJ policies, *see id.*, whereas a relator is not.

These intrusions upon Executive authority are no accident. Congress candidly viewed *qui tam* actions as "a critically needed supplement—and prod—to Government

prosecution," where the Executive had "not done an acceptable job of prosecuting defense contractor fraud." 132 Cong. Rec. at H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman); *see also* S. Rep. No. 345 at 25–26. The Tenth Circuit's disposition of this issue conflicts with *Morrison* and this Court should grant review to resolve the constitutional issues it left open in *Stevens*.[25]

CONCLUSION

The petition for certiorari should be granted.

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[25] The historical evidence considered by the *Stevens* majority as relevant to the Article III issue does not control the analysis here. Article III's reference to "cases" and "controversies" is understood to refer to actions "of the sort *traditionally amenable to, and resolved by the judicial process*," making history more relevant to the standing issue. *Id.* at 766 (emphasis added). The prosecutorial authority of the Executive branch is not similarly tied to a historical referent. Moreover, the "early *qui tam* statutes required a citizen to have suffered some private injury before he could sue on behalf of the government—unlike the FCA, which allows suit based solely on injury to the government." *Riley*, 252 F.3d at 773 & n.35 (Smith, J. dissenting) (collecting statutes). That distinction is more central to the Article II analysis than it was to standing, because bringing "suit based solely on injury to the government" is a defining characteristic of the Executive branch. *Buckley*, 424 U.S. at 140. In any event, as this Court has repeatedly held, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970); *see also Marsh v. Chambers*, 463 U.S. 783, 790 (1983); Barr Op. at 233-38 (history does not validate the *qui tam* provisions of the FCA).

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

UNITED STATES OF AMERICA, EX REL. JAMES S. STONE, AND UNITED STATES OF AMERICA,
PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS,
v.
ROCKWELL INTERNATIONAL CORP., AND BOEING NORTH AMERICAN, INC.,
DEFENDANTS-APPELLANTS AND CROSS-APPELLEES.
AMERICAN HOSPITAL ASSOCIATION, NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, ELECTRONIC INDUSTRIES ALLIANCE, AMICI CURIAE.

NOS. 99-1351, 99-1352, 99-1353.

MARCH 4, 2002.

Before BRISCOE, HOLLOWAY and POLITZ,* Circuit Judges.

ORDER ON REHEARING

HOLLOWAY, Circuit Judge.

The petition for rehearing en banc of Defendants-Appellants Rockwell International Corp. and Boeing North American, Inc., was circulated to the members of the panel and all circuit judges of the court in regular service. There having been no request for a poll on the suggestion of rehearing en banc, that suggestion is denied.

The petition for rehearing by the panel has been considered by the panel and it has been determined that rehearing is granted for the limited purpose of modifying the opinion and ordering a limited remand to the district court as provided herein. The limited remand to the district court is for the purpose of that court making findings of fact

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* The Honorable Henry A. Politz, United States Circuit Judge for the Fifth Circuit, sitting by designation.

and conclusions concerning the issue of disclosure prior to filing of this action in accordance with the False Claims Act concerning the saltcrete, pondcrete and irrigation matters and any further proceedings in the district court which the District Judge deems necessary in connection therewith.

Upon completion of those proceedings, a supplemental record will be transmitted to this court containing the additional findings and conclusions made on this limited remand, and this court will otherwise retain jurisdiction of this cause. See *Penteco Corp. Limited Partnership v. Union Gas System, Inc.*, 929 F.2d 1519, 1522 (10th Cir. 1991). On all other issues except that requiring the additional factual findings and conclusions on the saltcrete, pondcrete and irrigation matters, the rulings made previously in our opinion are undisturbed. Upon receipt of the supplemental record of the proceedings below, final disposition of these appeals will be made.

The court's opinion as modified on rehearing by the panel is being filed along with this order.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. NO. 89-M-1154)

This appeal comes to us from the latest round of litigation arising from environmental violations that occurred during the 1980s at the Rocky Flats nuclear weapons plant ("Rocky Flats"), near Golden, Colorado. Previously, we considered related appeals in *United States ex rel. Stone v. Rockwell Int'l Corp.*, No. 94-634 (10th Cir.); *United States v. Rockwell Int'l Corp.*, No. 96-1530, 124 F.3d 1194 (10th Cir. 1997); *United States ex rel. Stone v. Rockwell Int'l Corp.*, No. 97-1015 (10th Cir.); *In re Special Grand Jury*, 143 F.3d 565 (10th Cir. 1998); *United States ex rel. Stone v. Rockwell Int'l Corp.*, No. 98-1283 (10th Cir.); and *United States ex rel. Stone v. Rockwell Int'l Corp.*, 173 F.3d 757 (10th Cir. 1999). The instant appeal concerns False Claims Act claims, 31 U.S.C. § § 3729 *et seq.* (FCA), brought

by the Government and James S. Stone, a *qui tam* relator, against Rockwell International Corporation and Boeing North American, Inc. ("Rockwell"), as well as breach of contract and common law fraud claims brought by the Government alone. After careful consideration, on rehearing by the panel we make a limited remand for further findings and conclusions and affirm the remaining rulings.

I

From 1975 through 1989 Rockwell operated the Rocky Flats facility for the Department of Energy ("DOE") under a Management and Operating contract. Under this arrangement, Rockwell was compensated on a "cost-plus" fee basis, whereby Rockwell was reimbursed by DOE for "allowable costs" incurred in operating the plant and, once per year, received a "base fee" calculated at a pre-determined percentage of the overall value of the contract. In addition, the most significant portion of Rockwell's compensation for its management of Rocky Flats came in the form of an "award fee," a bonus paid every six months. The amount of this bonus was based on DOE's evaluation of Rockwell's performance in such areas as general management, production, and (critically for purposes of this appeal) environmental, safety and health operations.

James Stone began working at Rocky Flats as a Principal Engineer in the Facilities, Engineering and Construction Division, on November 10, 1980. He was promoted to the position of Lead Principal Engineer for Rocky Flats' Utility Design Department, Facilities Engineering Division, where he worked until March 1986, when he was laid off.

On June 25, 1987, after he had been laid off by Rockwell, Stone informed Special Agent Jon S. Lipsky of the Federal Bureau of Investigations about environmental crimes that had allegedly occurred at Rocky Flats during Stone's tenure there. Explaining to Agent Lipsky that he had had

"unlimited access" at Rocky Flats, Stone related a variety o allegations, including, *inter alia*, that contrary to publi knowledge, Rocky Flats accepted hazardous and nuclea waste from other DOE facilities; that Rockwell employee were "forbidden from discussing any controversies in fron of a DOE employee"; that although Rocky Flats' fluid bec incinerators failed testing in 1981, the pilot incinerato remained on line and was used to incinerate wastes daily since 1981, including plutonium wastes which were then sen out for burial; that Rockwell distilled and fractionate various oils and solvents although the wastes were geare for incineration; that Stone believed that the ground wate was contaminated from previous waste burial and lan application, and that hazardous waste lagoons tended t overflow during and after "a good rain," causing hazardou wastes to be discharged without first being treated. II App at 457-59.

Using the information he had learned from Stone, Agen Lipsky sought and received a search warrant to searc Rocky Flats. III App. at 778-787 (Lipsky Affidavit) Pursuant to this search warrant, on June 6, 1989, seventy five FBI and EPA agents conducted a search of Rocky Flats. Three days after Rocky Flats had been searched Agent Lipsky's affidavit was unsealed, prompting intens media coverage of the environmental violations allege therein. *See, e.g.*, Bruce Finley & Thomas Graf, "Rocky Flats illegally burned, dumped waste, U.S. claims," *Denve Post*, June 10, 1989; Sue Lindsay & Janet Day, "FBI: Flat burned waste secretly," *Rocky Mountain News*, June 10 1989.

Availing himself of the *qui tam* provision of the Fals Claims Act, 31 U.S.C. § 3730(b)(1) ("A person may bring civil action for a violation of section 3729 for the person an for the United States government. The action shall b brought in the name of the Government."), on July 5, 198 Stone filed the complaint that forms the basis for thi

appeal. The complaint, filed *in camera* and under seal, stated an FCA claim alleging that Rockwell, while managing Rocky Flats, concealed environmental, safety, and health problems from DOE throughout the 1980s. I App. at 81. It alleged that from at least as early as November 1980, Rockwell had been legally required to comply with certain federal and state regulations, statutes, laws, and agreements, including, *inter alia*: DOE Order 5483.1, as superseded by 5483.1A, for Occupational Safety and Health Program for Government Owned Contractor-Operated facilities; DOE Order 6430.1, the DOE General Design Criteria Manual, and DOE Order 5480.2; Colorado statutes, including Hazardous Substances, Colo.Rev.Stat. § § 25-5-501 *et seq.*, the Air Quality Control Program, Colo.Rev.Stat. § § 25-7-101 *et seq.*, Asbestos Control, Colo.Rev.Stat. § § 25-7-501 *et seq.*, the Colorado Hazardous Waste Act, Colo.Rev.Stat. § § 25-15-101 *et seq.*, the Water Quality Control Act, Colo.Rev.Stat. § § 25-8-201 *et seq.*, Radiation Control, Colo.Rev.Stat. § § 25-11-101 *et seq.*, Hazardous Substance Incidents, Colo.Rev.Stat. § § 29-22- 101 *et seq.*, and other specific provisions defining prohibited acts and reporting requirements with respect to hazardous substances, including, Colo.Rev.Stat. § § 25-5-503, 25-8-506 & 608, 25-15-08, 309, 310, 29-22-101 & 108; federal statutes, including the Occupational Safety and Health Act, 29 U.S.C. § § 651 *et seq.*, the Atomic Energy Act of 1954, as amended, 42 U.S.C. § § 2011 *et seq.*, the Energy Reorganization Act of 1974, 42 U.S.C. § § 5801 *et seq.*, the Water Pollution Prevention and Control Act, 33 U.S.C. § § 1251 *et seq.*, the Clean Air Act, 42 U.S.C. § § 7401 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. § § 6901 *et seq.*, the Safe Drinking Water Act, 42 U.S.C. § § 300f *et seq.*, and federal regulations applicable or enacted under these statutes. I App. at 87-89.

Stone alleged that Rockwell committed numerous violations of the above stated laws and regulations in

connection with its operation of Rocky Flats, and that "[i]n order to induce the government to make payments or approvals," Rockwell violated § 3729(a) of the FCA by, *inter alia*, knowingly presenting or causing to be presented to an officer or employee of the United States government, false and fraudulent claims for payment or approval, including requests or statements for payment, statements for reimbursement of costs, and applications for bonuses in connection with or under the Rockwell-DOE contracts; and knowingly making, using, or causing to be made or used, false records or statements intended to obtain approval and payment of these monies. I App. at 89-90.

In compliance with § 3730(b)(2) of the FCA, Stone filed his complaint in camera and provided to the Government a disclosure statement relating "substantially all material evidence and information" related to his claim in his possession. The relevant portions of this Disclosure Statement are discussed in Part II, *infra*. II App. at 491 (Plaintiff's Confidential Disclosure Statement of Material Evidence and Information). The United States, however, gave notice declining to intervene in the action, though it reserved the right to intervene at a later date upon a showing of good cause. I App. at 114-15.

While Stone's FCA claim was proceeding, in March 1992, in the culmination of a separate criminal investigation into Rockwell's management of Rocky Flats, Rockwell and the United States entered into a plea agreement under which Rockwell pled guilty to ten environmental violations. VI App. at 1861. Specifically, Rockwell's plea admitted knowing storage of mixed hazardous wastes (pondcrete and saltcrete), in violation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d)(2)(C); knowing storage of mixed hazardous wastes (pondcrete and saltcrete) without a permit or interim status, in violation of the RCRA, 42 U.S.C. § 6928(d)(2)(A); knowing treatment and storage of mixed hazardous wastes (concentrated salt brine)

without a permit or interim status, in violation of RCRA, 42 U.S.C. § 6928(d)(2)(A); knowing storage of mixed hazardous wastes (vacuum filter sludge) without a permit or interim status, in violation of the RCRA, 42 U.S.C. § 6928(d)(2)(A); negligent violation of the Clean Water Act (CWA) permit conditions (industrial wastes to the sewage treatment plant), in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A); negligent violation of CWA permit conditions (BOD violations, March 1988), in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A); negligent violation of the CWA permit conditions (BOD/Fecal Coliform violations, April 1988), in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A); negligent violation of CWA permit conditions (BOD violations, May 1988), in violation of 33 U.S.C. § 1319(c)(1)(A); knowing violation of CWA permit conditions (spray irrigation), in violation of the CWA, 33 U.S.C. § 1319(c)(2)(A); and negligent violation of CWA permit conditions (chromic acid spill), in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A). As part of its plea, Rockwell agreed to pay $18,500,000 in fines. VI App. at 1861-63.

The FCA specifies that courts lack jurisdiction over FCA claims based on public information unless "the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions...unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."). The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). In December 1992, Rockwell filed a motion to dismiss Stone's complaint for lack of subject matter

jurisdiction on the ground that Stone failed to satisfy the FCA's requirement that he be an "original source."

In response, on February 27, 1993, Stone submitted an additional affidavit and attached to it his original Disclosure Statement. We discuss the relevant portions of this affidavit in Part II, *infra*. On February 2, 1994 the trial judge denied Rockwell's motion to dismiss, finding that "Mr Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." IV App. at 893-96.

On November 14, 1995, the United States moved to intervene with respect to some, but not all of Stone's FCA allegations, and on November 19, 1996, the trial court granted the motion to intervene. IV App. at 900 (The Government's Motion For Leave to Intervene); *id.* at 964 (Memorandum Opinion and Order).

On December 20, 1996, in response to a suggestion from the trial judge,[1] the United States and Stone ("Plaintiffs") filed an amended complaint stating six counts against Rockwell. IV App. at 972. Count One stated a claim under the FCA, 31 U.S.C. § 3729(a)(1) & (2), brought by both the United States and Stone. IV App. at 995. Counts Two through Five stated claims for common law fraud, breach of contract, payment by mistake of fact, and unjust enrichment, and were brought by the United States alone. *Id.* at 996-1003. In Count Six, Stone (but not the United States), asserted an additional FCA claim alleging that Rockwell knowingly presented or caused to be presented to

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[1] After the United States intervened, the trial judge suggested that an amended complaint be filed to clarify the focus of the claims. Supp.App at 88-89 ("Now, I have noted, as already has been described, that there are sort of six areas, or the scope of claims that Mr. Stone has presently in the pleadings has six different areas of interest, whereas the government has talked about three apparently so far. So that's the stuff that needs clarification in the amended complaint....").

the Government false or fraudulent claims for money or property. *Id.* at 1004. The trial judge subsequently ordered that a separate trial be held on this claim. VI App. at 1621.

A jury trial was held on Counts One through Five. The main issue at trial was whether Rockwell concealed from DOE environmental, safety, and health problems related to the processing and storage of saltcrete and ponderete, two forms of processed toxic waste. Regarding the FCA claims, the jury was given a verdict form that asked it to answer the question: "Did the plaintiffs prove by a preponderance of the evidence that the defendant Rockwell International Corporation violated the False Claims Act to get one or more of the following claims under the Department of Energy Rockwell contracts paid or approved?" IV App. at 1119. The verdict form required the jury to answer that question for each of ten six-month periods, running from October 1, 1986, through December 30, 1989, each corresponding to an "Award Fee Period" or a period for which Rockwell received "Vouchers Accounting for Net Expenditures Accrued." *Id.* at 1119-20.

On April 1, 1999, the jury returned verdicts for Rockwell on the breach of contract claim and on seven of the ten FCA claims. However, the jury found for the Plaintiffs on the three remaining FCA claims and awarded $1,390,775.80 in damages. *Id.* After the jury verdict, when the Plaintiffs tendered a proposed form of judgment that included Stone as a party in whose favor judgment should be entered, Rockwell filed a post-trial memorandum arguing that Stone was not an "original source" for his amended FCA claims and thus was not entitled to judgment being entered in his favor or to recover attorney's fees and expenses. In response, the trial judge found that Stone was an original source.[2]

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[2] The trial judge noted, however, that Rockwell could appeal that determination; thus, when Stone filed motions seeking attorney's fees and expenses, the trial judge reserved ruling until after appeals on the

On May 13, 1999, the district court dismissed with prejudice the United States' claims for common law fraud, payment by mistake of fact, and unjust enrichment, his order stating:

> At a hearing held on May 7, 1999, based on all of the evidence received at trial, the court ruled that, as a matter of law, judgment should enter for the defendants on the equitable claims of the United States for unjust enrichment and recovery of payments made by mistake because the remedy would be inconsistent with the jury verdict for the defendants on the claim for breach of contract. The court also ruled that judgment should enter for defendants, as a matter of law, under Fed.R.Civ.P. 50(a) on the claim of the United States for damages for common law fraud, a claim that was not submitted to the jury because the government withdrew it. In the alternative, considering the oral motion to withdraw as a motion under Fed.R.Civ.P. 41(a)(2), the court orders that dismissal of the claim must be with prejudice.

Accordingly, on June 10, 1999, the district court entered judgment in favor of the Plaintiffs on the three FCA claims in the amount of $4,172,327 (awarding three times the amount awarded by the jury pursuant to 31 U.S.C. § 3729(a)). The court also awarded the United States a $15,000 civil penalty. Although one of Stone's FCA claims against Rockwell had yet to be tried, the district court certified its judgment on the jury verdict under Fed.R.Civ.P. 54(b).

Rockwell then filed this appeal, arguing that: (1) the trial court erred in finding that Stone was an "original source" of the information on which his FCA allegations

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grounds that an appeal "may well affect the determination of these motions." VI App. at 1570 (Order Reserving Ruling On Motions For Fees and Expenses).

were based; (2) *qui tam* relators do not have standing under Article III of the U.S. Constitution; (3) the FCA's *qui tam* provisions violate the Take Care and Appointments Clauses of Article II of the Constitution; and (4) the trial court erred in instructing the jury that DOE employees' knowledge of the facts allegedly concealed from the DOE was relevant to the FCA claims only if such employees had "authority to act" under the Government's contracts with Rockwell. The Plaintiffs filed cross-appeals, Stone arguing that a new trial is required to award further damages under the FCA, and the Government arguing that: (1) the district court erred in failing to instruct the jury that Rockwell breached its contract with DOE; and (2) the district court erred in dismissing with prejudice its common law fraud action.

II

A

Rockwell's first claim of error is that the trial court erred in ruling that Stone was an "original source" of the information on which his FCA allegations were based.

The FCA specifies that courts do not have jurisdiction over claims based on publicly disclosed information "unless the action is brought by the Attorney General," or as applies here, "the person bringing the action is an *original source* of the information." 31 U.S.C. § 3730(e)(4)(A) (emphasis added).[3] An "original source" is defined as one who "has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* at § 3730(e)(4)(B). Rockwell challenges as error the district

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[3] 31 U.S.C. § 3730(e)(4)(A) provides in full:

No court shall have jurisdiction over an action under this section based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

court's determination (made by two judges, once in 1994 and again in 1999), that Stone was an "original source" of the information on which his FCA claims were based.

Because this involves a question of subject matter jurisdiction, we conduct our review *de novo*. *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999) ("This court...reviews issues of subject matter jurisdiction *de novo*.") (citing *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 551 (10th Cir. 1992)). Since Rockwell has challenged the court's jurisdiction, the burden is on Stone to show, by a preponderance of the evidence, that jurisdiction exists. *Id.* Stone must therefore sustain "the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof." *Id.* (internal quotations omitted). "Mere conclusory allegations of jurisdiction are not enough." *Id.* (quoting *Penteco Corp. Ltd. Partnership v. Union Gas Sys. Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991)).

B

As an initial matter, we must consider Stone's contention that once the Government intervenes, as happened here, the trial court's jurisdiction is conclusively established and the original source requirement ceases to operate, on the theory that the case may proceed by virtue of the Government's presence in the litigation. We disagree. Intervention by the United States into a *qui tam* suit does not automatically endow the court with subject matter jurisdiction over both the claims by the United States and by the relator. We agree with the Fifth Circuit's persuasive analysis which rejected a relator's attempt "to end-run the 'original source' inquiry by arguing that the United States intervention in the action cured any jurisdictional defect.' That court held, and we agree, that in these circumstances

> [s]uch intervention does not.. confer subject matter jurisdiction over the relator's claims. Such a reading of the jurisdictional bar of 31 U.S.C. § 3730(e)(4)

> ignores the False Claims Act's goal of preventing parasitic suits based on information discovered by others. Indeed, under [plaintiff's] interpretation, the United States' intervention would cure the jurisdictional defects in all suits, even those brought by individuals who discovered the defendant's fraud by reading about it in the morning paper. The legislative history and policy behind the Act refute such a reading.

Federal Recovery Services, Inc. v. United States, 72 F.3d 447, 452 (5th Cir. 1995); *see also Eitel v. United States*, 242 F.3d 381 (9th Cir., 2000) ("Whether or not the government proceeds with this action [the relator] cannot because he is not an original source.").

Accordingly, we turn to the merits of whether Stone sufficiently demonstrated himself to be an original source of his allegations against Rockwell.

C

On two occasions Rockwell challenged Stone's status as an original source: first, in a Fed.R.Civ.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction in 1994, and then again in May 1999, after the jury had returned a verdict for the plaintiffs. Both times the court ruled that Stone was an original source.

On the first occasion the trial judge, Judge Carrigan, though acknowledging that Stone had conceded that he could identify neither the individuals who had allegedly falsely told the Government that Rockwell was in compliance with environmental, health, and safety laws, nor the specific documents containing these alleged misrepresentations, ruled that Stone nonetheless qualified as an original source. IV App. at 892-94 (Order at 3-4). Judge Carrigan based his ruling on his finding that Stone's duties at Rocky Flats included "plant-wide troubleshooting through which he gained knowledge of various environmental, health and safety problems," and that Stone

had been "informed that Rockwell's compensation was based on compliance with applicable environmental, health and safety regulations."[4] *Id.* at 893. Further, Judge Carrigan found that Stone had been instructed by Rockwell "not to divulge environmental, health and safety problems to the DOE." *Id.* Consequently, the judge ruled that given these findings,

> there is evidence that Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments. The fact that Mr. Stone was not aware of the specific persons or documents involved does not erase this knowledge.

Id. at 893-94. Accordingly, Judge Carrigan concluded that Stone possessed "direct and independent knowledge" of the information on which his allegations were based. Order at 4-5. Judge Carrigan denied Rockwell's motion to dismiss for lack of subject matter jurisdiction. *Id.* at 6-7.

In April 1999, a jury returned a verdict for plaintiffs on these claims of violation of the False Claims Act, awarding compensatory damages of $1,390,775 on those claims. The jury found for the defendant on the seven other False Claims Act claims and on the Government claim for breach of contract. The case was then before Chief Judge Matsch, and he adhered to Judge Carrigan's ruling that Stone was a proper *qui tam* relator and also to his rejection of the challenge to the constitutionality of he *qui tam* statute.

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[4] Judge Carrigan found that Stone had been given "a document stating that 'DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs,' including Nuclear Materials Management, Waste Management, Health Protection, Industrial Safety and Environmental Protection." Order at 4.

As noted, to qualify as an original source a relator must establish (1) that he possessed direct and independent knowledge of the information on which his claim is based, and (2) that he voluntarily conveyed the information to the Government prior to filing suit. 31 U.S.C. § 3730(e)(4)(B). Rockwell challenges the sufficiency of Stone's showing on both these requirements.

D

We have explained that for purposes of determining whether a relator qualifies as an original source, the FCA's direct and independent knowledge requirement is properly construed to mean that the knowledge possessed by the relator must be "marked by the absence of an intervening agency...[and] unmediated by anything but the relator's own labor." *United States ex rel. Hafter v. Spectrum Emergency Care*, 190 F.3d 1156, 1162 (10th Cir. 1999) (quoting *United States v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996)) (alternations in original). In other words, "direct knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others," while independent knowledge means that "the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources." *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006-07 (10th Cir. 1996) (citation omitted).

United States ex rel. Hafter v. Spectrum Emergency Care is our most recent and fullest discussion of what is required for a relator to demonstrate direct and independent knowledge. *Hafter* concerned an appeal from the district court's grant of a motion to dismiss for lack of subject matter jurisdiction because the relator allegedly was not an original source. 190 F.3d at 1157-58. The relator had served as both an emergency room physician under an independent contract with Texas Emergency Room Services, P.A., an outside organization contracted to staff

the Emergency Room at the Dallas/Fort Worth Medical Center, and as a medical director responsible for supervising emergency room services and physicians. After the Medical Center had terminated Texas Services' contract, the relator's own contract with Texas Services was terminated. Soon thereafter, he was contacted by an attorney researching a medical malpractice case. During their interview, the relator told the attorney about alleged mismanagement of the emergency room, who then used this new information to amend his malpractice complaint to include alleged violations of the Texas Medical Practices Act.

Approximately one year after the filing of this suit, the relator filed his own *qui tam* suit alleging false and fraudulent Medicare, Medicaid and/or Champus reimbursement claims to the Government. When the defendant moved to dismiss for lack of subject matter jurisdiction, the district court ruled that because the information underlying his complaint had been publicly disclosed in the earlier suit brought by the attorney who had contacted the relator, the court could have jurisdiction only if the relator qualified as an original source. Finding that he failed to meet the dual requirements imposed on the relator, the district court granted the motion to dismiss.

On appeal, we focused our inquiry on determining whether the relator had the requisite direct and independent knowledge. We determined that the burden was on the relator to demonstrate that he had discovered the information on which his allegations were based through his "own efforts and not by the labors of others," and that his "information was not derivative of others." *Hafter*, 190 F.3d at 1162. On the facts presented by the relator, we held that he failed to satisfy this burden. We characterized his complaint, which merely stated that he had "direct and independent knowledge of the information upon which this suit is based," as stating only an "unsupported, conclusory

allegation" and ruled that it was insufficient to establish jurisdiction. *Id.* Likewise, we found that the relator's memorandum submitted in response to the motion to dismiss was equally deficient. Because a "mere assertion of knowledge, without adequate basis in fact and unsupported by competent proof is insufficient to establish jurisdiction," we held that such "equivocal statements" were inadequate to satisfy the direct and independent knowledge element for an original source. *Id.* at 1163 (citing *Wenz v. Memery Crystal*, 55 F.3d 1503, 1508-09 (10th Cir. 1995)).

Notwithstanding Rockwell's claim that Stone's evidence of his direct and independent knowledge is inadequate to satisfy the specificity we required in *Hafter*, we believe that Stone has adduced sufficient competent proof to establish that he had direct and independent knowledge of the information on which his FCA claim was based. Unlike in *Hafter*, where the relator could muster only a conclusory submission to the court that he had direct and independent knowledge which was devoid of specifics, here review of the record convinces us that Stone has been specific and detailed in showing how he obtained, through his own efforts and not through the labors of others, direct and independent knowledge that Rockwell's designs for manufacturing pondcrete blocks would result in the release of toxic waste. Stone supplied the district court with an affidavit detailing his duties and responsibilities at Rocky Flats and describing his observations there that underpinned his FCA action. Stone averred that he commenced employment with Rockwell at Rocky Flats on November 10, 1980, as a Principal Engineer in the Facilities, Engineering and Construction Division, and that he was subsequently promoted to Lead Principal Engineer for Rocky Flats' Utility Design Department, Facilities Engineering Division, where he continued to serve until his employment was terminated on March 17, 1986. Stone averred that his duties at Rocky Flats included plant-wide

"troubleshooting" and reviewing designs and existing operations for safety and cost effectiveness. II App.at 291.

In this affidavit Stone further averred that in the course of his work at Rocky Flats, he was assigned to a project addressing the manufacturing process for pondcrete, a mixture of cement and sludge and liquid from evaporation ponds containing toxic industrial wastes. As part of his assignment, Stone averred that he "*studied aspects of the design proposed by Rockwell management for making pondcrete,*" *and that he "concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment.*"[5] *Id.* at 298 (emphasis added).

Stone's affidavit states that he communicated his concerns about the pondcrete manufacturing process to Rockwell's management in an October 13, 1982 "Engineering Order," which he attached as an exhibit to his affidavit. This Engineering Order was explicit in articulating his belief that the proposed design for making pondcrete was flawed: *"This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation ...."* *Id.* at 439 (Engineering Order). Despite this warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure.

Nor is Stone's affidavit the only document that establishes that he possessed direct and independent knowledge of alleged pondcrete manufacturing deficiencies. We also find it significant that Stone in a July 5, 1989, confidential disclosure statement provided to the Government detailed how he became aware of Rockwell's

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[5] Stone also averred that he had noted, based on his "knowledge of the chemical processes at Rocky Flats, that the sludge and liquid present in the evaporation ponds contained some of the most toxic and radioactive substances at Rocky Flats, which made the unstable nature of the pondcrete particularly hazardous."

allegedly faulty process for manufacturing pondcrete. In a section of this statement entitled "Analysis of pondcrete method for drainage of solar evaporation ponds," Stone related:

> Solar evaporation ponds have, for some time, been used to treat...hazardous wastes. *Mr. Stone reviewed a design for the process and mechanical system intended to be used for removing sludge from these ponds.* The system was proposed by a Mr. Leon Fong. Based on Mr. Stone's years of experience in the handling of sewage and sludge, *he immediately recognized that the design could not work and would lead to serious problems.* For example, the system was designed to remove sludge from the pond and mix that sludge with cement in order to create blocks of "pondcrete" for disposal use. *Mr. Stone foresaw that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the "pondcrete" blocks would rapidly disintegrate thus creating additional contamination problems.*

II App. at 509 (Plaintiff's Confidential Disclosure Statement of Material Evidence and Information) (emphasis added).

Moreover in his disclosure statement Stone described how Rockwell forbade him from discussing any e[illegible]nmental problems at Rocky Flats with the DOE.

> [illegible] about September 1981, three managers, William Nichol, Sam Cerise and Robert Jensen, met with Mr. Stone regarding the communication with DOE. In that meeting, Mr. Nichol expressly told Mr. Stone that he did not want *any* government agency learning anything about problems or conditions that Mr. Stone may become aware of in connection with his employment at Rocky Flats. Mr. Nichol ordered

> Mr. Stone, in particular, not to communicate with the DOE regarding such matters, or with any government agency at all. Further, Mr. Stone was told that if he violated this gag order, he would be fired. Mr. Stone's request that this order be put in writing was refused.

Id. at 496 (emphasis added).

We believe that the information is sufficiently specific to satisfy the standard set out in the FCA and in our opinions. Stone clearly articulated in his affidavit and disclosure statement that he learned the facts underlying his claim by reviewing Rockwell's plans for producing pondcrete. We thus are convinced that he sufficiently alleged "specific facts–as opposed to mere conclusions–showing exactly how and when he...obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support[ed] those allegations with competent proof," and that this knowledge was discovered though his own labor. *Hafter*, 190 F.3d at 1162.

We are not persuaded by Rockwell's arguments to the contrary, which are permeated by a flawed understanding of the FCA's definition of direct and independent knowledge. The underlying assumption of Rockwell's arguments is that a relator must have direct and independent knowledge of the *actual* fraudulent submission to the government. Rockwell thus argues that to establish himself as an original source, Stone needed to have had direct and independent knowledge of the specific documents that informed DOE that Rocky Flats was in compliance with environmental, health and safety laws, as well as the specific individuals who submitted those inaccurate claims.

The plain text of the FCA, however, belies this interpretation; the FCA is clear that for a relator to be an original source he need only possess "direct and independent knowledge of the *information on which the allegations are based.*" 31 U.S.C. § 3730(e)(4)(B). In *Hafter*,

we explained that the phrase "information on which the allegations are based" means "the information underlying or supporting the fraud allegations contained in the plaintiff's *qui tam* complaint." *Hafter*, 190 F.3d at 1162 (emphasis added). We thus drew a distinction between the actual act of fraud, i.e. the actual submission of inaccurate claims by Rockwell to DOE, and the facts underlying or which give rise to the fraud, i.e. the environmental, health and safety violations themselves. The relator need not, as Rockwell says, have in his possession knowledge of the *actual* fraudulent conduct itself; knowledge "underlying or supporting" the fraud allegation is sufficient. *Id.* Thus, we are persuaded that Stone's knowledge that a defective pondcrete manufacturing process would be employed, gained from his review of Rockwell's plans, constitutes knowledge of information "underlying or supporting" his allegation concerning Rockwell's alleged ultimate fraudulent activity (the submission of claims to the DOE falsely stating that Rocky Flats was in compliance with environmental, health and safety laws).

For the same reasons, we are not persuaded by Rockwell's argument that Stone could not be an original source for the pondcrete claim because he no longer worked at Rocky Flats when the manufacture of pondcrete blocks commenced. The gravamen of Stone's claim is that he learned from studying Rockwell's plans for manufacturing pondcrete that the blocks would leak toxic waste. The fact that he was not physically present at Rocky Flats when production began is immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case Rockwell's awareness that it would be using a defective process for manufacturing pondcrete.

Nor do we find persuasive Rockwell's argument that Stone could not have had direct and independent knowledge of the information on which his pondcrete claim was based

because, Rockwell asserts, it is "preposterous" to think that the alleged defects in design Stone identified in his review of the designs later caused solidity defects in the pondcrete blocks. Appellant's Opening Brief at 37. Rockwell's objection does not carry weight; whether the alleged design flaws noted by Stone in his Engineering Report actually caused the production of malformed pondcrete blocks is immaterial. For a relator to be properly qualified as an original source, he must have had direct and independent knowledge of the information on which his claim is based. But whether that claim is ultimately flawed on the merits is an analytically distinct question from the one mandated by the FCA for establishing jurisdiction. It is for the finder of fact to determine whether the plaintiff's theory has merit; to satisfy the direct and independent prong of the original source test, the relator need only show that he possessed direct and independent knowledge of the information upon which his claim is based, not that his claim is factually correct.

Therefore, we hold that Stone has adequately established himself as having direct and independent knowledge of his allegation that Rockwell manufactured insolid pondcrete (which Rockwell concealed from the Government).

E

On reconsideration of the second prong of the original source test–which requires that Stone have voluntarily provided the information underlying his pondcrete claim, his saltcrete claim and his irrigation claim to the United States before filing suit–the court finds that the record does not reveal specific and pertinent findings-of-fact by either of the judges who considered the pre-filing disclosure issue to support a conclusion whether the required disclosure was or was not made. While there is considerable material in our record on this issue, this appellate court should not perform

the fact-finding function reserved for the district courts. *See Davis v. United States*, 192 F.3d 951, 961 (10th Cir. 1999).

Accordingly, this court hereby directs that there be a limited remand to the district court for the purpose of findings and conclusions being made to ascertain whether the required pre-litigation disclosure to the Government was made, and for any further proceedings by any hearings that the district court shall find proper and necessary on this issue. We therefore make a limited remand for further proceedings in accord with this order, further findings, conclusions and a further ruling on the jurisdictional issue, which shall be certified as a supplemental record to this court; otherwise this court will retain jurisdiction of these appeals.

III

Rockwell presents a number of constitutional challenges to *qui tam* actions under the FCA, arguing that *qui tam* relators lack Article III standing, that the FCA's *qui tam* provisions violate the Appointments Clause of Article II, and that they also violate the Take Care Clause of Article II. We review *de novo* challenges to the constitutionality of a statute. *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir. 1995).

A
Standing

Rockwell's challenge to the Article III standing of relators is easily disposed of. Recently, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), the Supreme Court held that relators do have standing to litigate *qui tam* claims. *Id.* at 1865 ("We think this history well nigh conclusive with respect to the question before us here: whether qui tam actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.' When combined with the

theoretical justification for relator standing...it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.") (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). Therefore, we are obliged to reject Rockwell's contention that *qui tam* relators lack Article III standing.

The *Stevens* Court, however, was careful to specify that it was expressing no opinion concerning other constitutional challenges to *qui tam* actions, namely whether they violate the Take Care and Appointment Clauses of Article II. *Id.* at 1865 n. 8 ("[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."). Accordingly, we turn now to these remaining arguments.

B

The Appointments Clause

Rockwell argues that the FCA's *qui tam* provisions violate Article II's Appointments Clause, which states in part that the President shall nominate and "by and with the Advice and Consent of the Senate, shall appoint...all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

By making this distinction, the Constitution establishes a bifurcated system of appointments: principal officers are appointed by the President with the "Advice and Consent of the Senate," while Congress may vest the appointment of "inferior Officers" in "the President alone, in Courts of Law, or in the Heads of Departments." *Edmond v. United States*, 520 U.S. 651, 117 S.Ct. 1573, 137 L.Ed.2d 917 (quoting Article II). Rockwell suggests that the FCA's enforcement

scheme permits private relators to "appoint themselves as prosecutors" and thus runs afoul of the requirements of the Appointments Clause because, according to Rockwell, *Buckley v. Valeo*, 424 U.S. 1, 126, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), mandates that only a properly appointed "Officer of the United States" may conduct litigation on behalf of the United States, and that relators are not appointed by any of the sanctioned methods of appointing officers. Appellant's Opening Brief at 48.

We are not persuaded that *Buckley* suggests that we should find an Appointments Clause violation here. The procedural requirements of the Appointments Clause only apply to the appointment of officers. Thus, the threshold question that we face is whether *qui tam* relators are "officers" for purposes of Article II. We conclude that they are not; *qui tam* relators do not serve in any office of the United States. There is no legislatively created office of informer or relator under the FCA. Relators are not entitled to the benefits of officeholders, such as drawing a government salary. And they are not subject to the requirement, noted long ago by the Supreme Court, that the definition of an officer "embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or temporary." *United States v. Germaine*, 99 U.S. 508, 511-12, 25 L.Ed. 482 (1878); see also *Auffmordt v. Hedden*, 137 U.S. 310, 327, 11 S.Ct. 103, 34 L.Ed. 674 (1890) ("His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an 'officer' within the meaning of the clause of the constitution referred to.").

We therefore conclude that Rockwell construes *Buckley* too broadly: that opinion held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2,

cl.2, of that Article." *Buckley*, 424 U.S. at 126, 96 S.Ct. 612. The Court was clear, however, that this definition of an officer of the United States should be construed in conformity with its prior *Germaine* and *Auffmordt* opinions, which the *Buckley* Court extensively quoted with approval. *Id.* at 124-25 & n. 162, 96 S.Ct. 612. Since *qui tam* relators do not meet these requirements, quoted *supra*, we, like the other circuits that have considered the question, hold that the FCA's *qui tam* provisions do not contravene the Appointments Clause. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-58 (5th Cir.2001) (en banc); *United States ex rel. Taxpayers Against Fraud v. General Electric Corp.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex. rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993).

C

The Take Care Clause

We now direct our attention to Rockwell's argument that the FCA's *qui tam* provisions violate Article II's Take Care Clause, which establishes that the Executive is the branch of government which "shall take Care that the laws be faithfully executed." U.S. Const., art. II, § 3. Rockwell contends that the FCA interferes with the Executive Branch's constitutionally assigned duty to enforce the nation's laws by conferring law enforcement powers on politically unaccountable private relators who are not subject to control by that Branch of the Government and who are motivated solely by private financial interests that may be inimical to the Government's interests. *See* Appellant's Opening Brief at 46.

On the facts of this case, we are not persuaded that a constitutional violation has occurred. Rockwell argues that the *qui tam* provisions run afoul of *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), which established that congressional action must leave the Executive Branch with sufficient "control" over its litigation so as to "ensure that the President is able to perform his

constitutionally assigned duties." *Morrison*, 487 U.S. at 696, 108 S.Ct. 2597. Rockwell contends that application of the FCA's *qui tam* provisions violate the Morrison test because the Executive has no power to remove the relator from the lawsuit (31 U.S.C. § 3730(c)(3)); the Executive cannot control the breadth of the relator's claims (31 U.S.C. § 3730(c)(3)); if the Executive seeks to intervene after initially declining to do so (as happened here) it may intervene only if the court finds "good cause" for such intervention, and even then the Executive cannot limit the relator's "status and rights" (31 U.S.C. § 3730(c)(3)); and if the Executive is allowed to intervene after initially declining to do so, it is barred from dismissing the relator's claims, and is thereby stripped of any power to terminate *qui tam* actions under those circumstances (31 U.S.C. § 3730(c)(3)).

We are not persuaded that in the circumstances of this case, the separation of powers, as embodied in the Take Care Clause, has been transgressed. The Government sought, and was granted permission, to intervene. Consequently, the Government was a full and active participant in the litigation as it jointly prosecuted the case with Stone. Given that the Government was permitted to intervene, we remain unconvinced by Rockwell's contention that the presence of a *qui tam* relator in the litigation so hindered the Government's prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities. *Morrison*, 487 U.S. at 695-96, 108 S.Ct. 2597.[6]

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[6] We express no opinion regarding whether the FCA's *qui tam* provisions violate the separation of powers or the Take Care Clause in circumstances other than those presented in this case, i.e. if the Government had sought permission to intervene, but was denied intervention by the district court, or if the Government desired to remove the relator from the action but was prevented from doing so by application of the statute.

Accordingly, we agree with the Fifth, Sixth, and Ninth Circuits, and hold that at least where the Government intervenes, the *qui tam* provisions of the FCA do not violate the separation of powers by transgression of the Take Care Clause. *Riley*, 252 F.3d at 753-57 ("[T]he *qui tam* portions of the FCA do not violate the constitutional doctrine of separation of power by impinging upon the Executive's constitutional duty to take care that the laws are faithfully executed under Article II of the Constitution."); *Taxpayers Against Fraud*, 41 F.3d at 1041 ("The *qui tam* provisions adopted by Congress do not contradict the constitutional principle of separation of powers."); *Boeing*, 9 F.3d at 755 ("[T]he Executive Branch exercises at least an equivalent amount of control over *qui tam* relators as it does over independent counsels. Thus, the FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns.") (footnote omitted).

We have examined relevant opinions of the Fifth, Sixth and Ninth Circuits and are persuaded that at least where the Government is permitted to intervene and does so, the *qui tam* provisions of the FCA do not violate the Take Care Clause provisions of Article II and their separation of powers principles. We have earlier discussed these decisions in Part II B in connection with the Appointments Clause and there held that the FCA *qui tam* provisions do not contravene that clause. We now focus on the Take Care Clause of Article II.

In *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 753-57 (5th Cir.2001) (en banc), the Fifth Circuit upheld the FCA *qui tam* provisions against Take Care objections where the Government chooses to intervene and does so. Riley noted that the Executive retains significant control over litigation pursued under the FCA by a *qui tam* relator, *id.*, including power to veto settlements for example. The Fifth Circuit concluded that the *qui tam* portions of the

FCA do not violate constitutional principles of separation of powers by impinging on the Executive's constitutional duty to take care that the laws are faithfully executed under Article II of the Constitution. 252 F.3d at 757.

The Sixth and Ninth Circuits expressed similar views. In *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032 (6th Cir. 1994), a similar Take Care objection was made to the constitutionality of the FCA's *qui tam* provisions. The Sixth Circuit rejected the objections, agreeing with the Ninth Circuit's ruling in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 433 (1994). The Sixth Circuit explained that the *qui tam* provisions do not contravene the constitutional principle of separation of powers; that the statute was crafted with particular care to maintain the primacy of the Executive Branch in prosecuting false-claims actions, even where the relator has initiated the process; and that indeed, if the Government decides not to intervene in a relator's case (which is not the case here) it may still require the relator to inform it of developments, among other things. Thus, the Sixth Circuit concluded that "the Executive Branch retains 'sufficient control' over the relator's conduct to insure that the President is able to perform his constitutionally assigned dut[y]." *Taxpayers*, 41 F.3d at 1041 (citing *Morrison v. Olson*, 487 U.S. 654, 696, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988)).

In sum, we hold that the *qui tam* provisions of the FCA do not violate the Take Care Clause protective provisions of Article II in the circumstances of this case where the Government intervened.

IV

Both Stone and the Government argue that a new trial is required to award damages to compensate for costs incurred in the repair of damage caused by the faulty pondcrete blocks. They contend this is made necessary by the trial

court's erroneous refusal to grant their motion for a new trial on damages because the jury's damage award was improperly influenced by allegedly irrelevant and prejudicial testimony.

In his instructions to the jury, the trial judge charged that damages in the form of compensation for pondcrete repair costs should be awarded if they were incurred "because of" Rockwell's FCA violations. Plaintiffs contend that despite this instruction, the jury, though it found Rockwell liable, failed to compensate the Government for repair costs. Plaintiffs arrive at this conclusion from the fact that the jury award amounted to only $1,390,775.80 in damages–an amount exactly equal to ten percent of the fees paid by the Department of Energy to Rockwell during the period for which the jury found Rockwell liable. Plaintiffs contend that since during this relevant period "waste management" had a ten percent weight in the formula for calculating Rockwell's renumeration from the Department of Energy, the jury must have compensated the Government for its waste management fees only, and therefore wrongly excluded from its award the pondcrete repair costs.[7]

Plaintiffs argue that the jury's decision not to include pondcrete repair costs in its award of damages can only be explained by the jury having credited the "improperly admitted" testimony of defense expert witness Glen Sjoblom, who testified that the Department of Energy had reimbursed contractors for repair costs at other facilities. This testimony was improper, Plaintiffs maintain, because it addressed whether repair costs were reimbursable under the DOE-Rockwell contract, an issue that they contend is unrelated to the FCA claim and which the jury was not permitted to decide because "allowable" costs by contract

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[7] Plaintiffs maintain that Rockwell's own expert testified that if Rockwell were to be found liable, the Government would be entitled to at least $302,000 for pondcrete repair costs. IX App. at 4663.

are not non-recoverable as damages resulting from an FCA violation.

Plaintiffs' claim of error is predicated on the assumption that the jury calculated its award of damages in an impermissible manner. Our holding in *Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 500-502 (10th Cir. 1983), however, establishes that such an assumption is not to be lightly made. In *Midwest*, we considered whether the district court should have granted a new trial based on a jury's award of damages in the amount of $3,911,637, a figure equaling the exact amount claimed by the plaintiff for "product shortage," a damage item that was contingent upon a finding that the defendant was liable on a counterclaim. However, even though the jury denied the counterclaim, it nonetheless awarded that exact amount. Despite this remarkable coincidence, we held that the defendant was not entitled to a new trial:

> While the likelihood of a coincidence in numbers may be very small, the possibility of the special attractiveness of $3,911,637 as a consciously selected damage award appears to us to be a distinct possibility. The jury had before it exhibit 104, which displayed a variety of numbers, including the $3,911,637 figure. Exhibit 104 also contained a damage figure for some of the state law claims which, when added with other figures of damage the jury could award, would come close to the $3,911,637 figure. The second plausible explanation is that the jury was confused.... The first explanation would require that we uphold the award, the second that we reverse and remand for a new trial.... Given this choice between a possible proper determination of a figure and a possible instance of jury confusion, we cannot freely exercise our own judgment as to the most plausible.... It is well settled that a verdict will

> not be upset on the basis of speculation as to the manner in which the jurors arrived at it.

Id. at 501.

The issue in *Midwest* is legally indistinguishable from the one presented here. Accordingly, we hold that the district court did not abuse its discretion in denying Plaintiffs' motion for a new trial.

V

The Government argues that the trial judge erred by dismissing with prejudice its claim for common law fraud. We note that during trial the judge expressed concern that the common law fraud claim could confuse the jury. VIII App. at 35, 70, Proceedings of March 16, 1999. On March 23, 1999, the Government moved to dismiss the fraud claim. IX App. at 4514. The Government's motion to dismiss was silent as to whether the dismissal would be with or without prejudice. However, in his Order for Entry of Final Judgment, the judge specified that the dismissal was with prejudice. *See* Order for Entry of Final Judgment Pursuant to Rule 54(b), at 2. The Government now argues that the court erred by dismissing the claim with prejudice.

We review the trial judge's dismissal with prejudice for an abuse of discretion. *Ohlander v. Larson*, 114 F.3d 1531, 1536-37 (10th Cir. 1997). Our review of the record convinces us that the trial judge did not abuse his discretion in stating the dismissal was with prejudice. Although the Government suggests that it was blind-sided by what it characterizes as a completely unexpected decision by the trial judge to dismiss the fraud claim with prejudice, we think the circumstances of the trial judge's ruling show otherwise.

On March 16, 1999, the fifteenth day of trial (the trial lasted twenty-five days), the trial judge informed counsel that he had decided not to submit the common law fraud claim to the jury because in his view the DOE's conduct made it ineligible for rescission, the remedy for fraud. The trial judge plainly told counsel: *"Well I'm not going to*

submit that claim. I don't think this is a rescission case. I think they've waived that remedy by their conduct after they knew what they knew." VIII App. at 3569 (emphasis added).

Our review of the record convinces us that counsel for the Government recognized that the trial judge would not submit the fraud claim to the jury because counsel's response to the trial judge was to ask that before the judge made a formal ruling, the Government be permitted to brief the issue: "I think that we would like–I would ask that we be permitted to submit something in writing to Your Honor before you make a final...ruling on that." *Id.* at 3569-70. The trial judge granted the Government permission to do so. *Id.* at 3570. In this same exchange, the judge said he did not know "why you've got a common law fraud claim in this case. You're just confusing the case, and you're going to confuse the jury and that doesn't help you. But that's your call." VIII App. at 3570.

There is no indication in the record that the Government made any written submission. However, seven days later, on March 23, 1999, counsel for the Government announced in court that he was moving to dismiss the common law fraud claim. He stated: "I do have authorization from my office to move to dismiss the common law [fraud] claim, and I'm doing so." IX App. at 4514. Government counsel made no comment indicating that the dismissal was with or without prejudice. The judge accepted the Government's statement about dismissal, saying "All right," and adding, "So that it would be breach of contract and false claims...I think that will help in clarifying the issues," to which Rockwell's counsel agreed. *Id.*

On May 13, 1999, the judge entered an "Order For Entry Of Final Judgment Pursuant to Rule 54(b)." That order recited the returning of jury verdicts on April 1, 1999, for the plaintiffs on three FCA claims, findings for the defendant on the other seven FCA claims, and on the

Government's claim for breach of contract. The order further stated that the court

> also ruled that judgment should enter for the defendants, as a matter of law, under Fed.R.Civ.P. 50(a) on the claim of the United States for damages for common law fraud, a claim that was not submitted to the jury because the Government withdrew it. In the alternative, considering the oral motion to withdraw as a motion under Fed.R.Civ.P. 41(a)(2), the court orders that dismissal of the claim must be with prejudice.

Order at 1-2.[4]

We find no error in the judge's interpretation of the Government's oral motion to dismiss as abandoning the common law fraud claim. Rule 41(a)(2) provides that after a defendant has filed an answer, a plaintiff may voluntarily dismiss a claim only upon an order of the court. *Ohlander*, 114 F.3d at 1536-37. The rule also provides that "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Fed.R.Civ.P. 41(a)(2). But a plaintiff may voluntarily dismiss his action "so long as the defendant is not hurt," and the court's consent to voluntary dismissal may be conditioned "upon such terms and conditions as the court deems proper." *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir. 1994) (quoting *McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir. 1985)). Typically, "a court imposes as a term and condition of dismissal [without prejudice] that plaintiff pay the defendant the expenses he has incurred in defending the

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[4] Thus, the trial judge ruled first that judgment should be entered for Rockwell on the common law fraud claim as a matter of law under Fed.R.Civ.P. 50(a), and then alternatively that considering the oral motion to withdraw as a motion under Fed.R.Civ.P. 41(a)(2), the judge ordered that dismissal of the claim "must be with prejudice." See Order for Entry of Final Judgment, at 2. Because we hold that the trial court did not abuse its discretion in dismissing the claim with prejudice, we need not address whether the court erred in its Rule 50(a) ruling.

suit, which usually includes reasonable attorney's fees." *Marlow*, 19 F.3d at 303 (citing 5 Moore's Federal Practice, ¶ 41.06 at 41-81 to 41-86 (1993)).

The Government relies, *inter alia*, on *United States v. One Tract of Real Property*, 95 F.3d 422 (6th Cir. 1996), arguing that the trial judge was obliged to give notice to the plaintiff of his insistence that the dismissal be with prejudice so as to permit withdrawal of the motion to dismiss. *Id.* at 426. The Sixth Circuit noted three factors to be considered in determining whether a trial judge abused his discretion by a dismissal with prejudice "in response to a plaintiff's request for dismissal without prejudice." *Id.* at 425. Those factors were stated as: the judge giving notice of his intention to dismiss with prejudice; affording an opportunity to be heard in opposition to dismissal with prejudice; and giving the plaintiff an opportunity to withdraw the request for dismissal and proceed with the litigation. *Id.* at 425-26 (citing *Jaramillo v. Burkhart*, 59 F.3d 78 (8th Cir. 1995); *Marlow v. Winston & Strawn*, 19 F.3d 300 (7th Cir. 1994); *Andes v. Versant Corp.*, 788 F.2d 1033 (4th Cir. 1986)). We are impressed by these factors and opinions, with which we do not disagree. However, on careful consideration of the record in this instant case, we are persuaded that we are presented with a materially different case.

Unlike *One Tract*, *Jaramillo*, *Marlow*, and *Andes*, in each of which the plaintiff said the dismissal would be without prejudice, in the instant case the Government made no such statement in its motion ("I do have authorization from my office to move to dismiss the common law [fraud] claim, and I'm doing so now," IX App. at 4514). On the other hand there was no statement the dismissal was with prejudice. We must therefore determine whether the judge abused his discretion, in the circumstances, by saying in the Order that "dismissal of the claim must be with prejudice." Order at 2.

In a similar controversy, the Seventh Circuit said the appellate court's task is to determine whether the interpretation by the trial judge was an abuse of discretion. *See Babcock v. McDaniel*, 148 F.3d 797, 799 (7th Cir. 1998) (where the plaintiff's motion to dismiss "did not speak to the issue of prejudice at all," the district judge was "required to interpret [the motion] one way or the other, and our task in reviewing the district court's decision is to determine whether the interpretation adopted by the district court was an abuse of discretion"). Given the context in which the Government's motion to dismiss was made here in proceedings on March 23, 1999 (IX App. at 4514), a week after the judge announced on March 16, 1999, that he was not going to submit the common law fraud claim to the jury (VIII App. at 3569), we are persuaded there was no abuse of discretion in ordering that the dismissal "must be with prejudice." Order at 2.

In these circumstances, we are persuaded that the judge did not abuse his discretion by providing that the dismissal must be with prejudice.

VI

To establish a violation of the FCA, the plaintiff must show that the defendant presented a claim to the Government knowing it was false or fraudulent. *United States ex rel. Aakhus v. Dyncorp*, 136 F.3d 676, 682 (10th Cir. 1998). The defendant, however, may be able to cast doubt on whether he "knowingly" submitted a false claim by showing that the Government itself was already aware of the facts underlying the FCA claim when the allegedly fraudulent claim was submitted. *United States ex rel Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 326-27 (9th Cir. 1995).

Rockwell now claims that it tried to do this by presenting evidence purporting to show that certain mid and low-level DOE employees believed that Rockwell had not misled them. Rockwell thus argues that the trial judge

erred in his instructions on the intent requirement by instructing the jury that when assessing whether the plaintiffs had shown that Rockwell had "knowingly" submitted false claims, they should consider "all direct and circumstantial evidence, if any, concerning whether one or more government employees with authority to act under the Rockwell contracts with DOE knew the relevant facts concerning pondcrete, saltcrete and spray irrigation, and the costs incurred related to those activities." IX App. at 5294.

Rockwell claims that this instruction limited the pool of Government officials to DOE "contracting officers" only, and thus precluded the jury from considering any knowledge obtained by mid and lower-level DOE employees. Consequently, Rockwell contends that the jury was improperly prohibited from considering probative evidence that mid-level and lower-level DOE employees were aware of the information that Rockwell had allegedly concealed.[9] The instruction at issue is set out in the margin.[10]

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[9] Stone argues that we should not consider this challenge to the jury instructions because Rockwell did not object to the proposed instruction at trial and thus did not preserve the issue for appellate review. We do not agree, and are convinced that the issue was properly preserved.

[10] After informing the jury that in order for Rockwell to be liable for a FCA violation, the plaintiffs must establish that "Rockwell knew that the statements it made or used or caused to be made or used were false," the judge instructed the jury that Defendant claims that the government, through various employees of the Department of Energy, had prior knowledge of facts relating to the false statements that defendant allegedly made concerning pondcrete, saltcrete and spray irrigation operations at Rocky Flats. The government denies the existence of such prior knowledge. In considering whether Rockwell knowingly made any false statements, you must consider all direct and circumstantial evidence, if any, concerning whether one or more government employees with authority to act under the Rockwell contracts with DOE knew the relevant facts concerning pondcrete, saltcrete and spray irrigation, and the costs incurred relating to those activities.

Government knowledge may negate the intent by defendant required to establish a violation of the False Claims Act. If you find that government employees with authority to act under the contracts knew the relevant facts, then you may consider it in determining whether

We conduct our review *de novo* to determine whether, as a whole, the jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards. *Brown v. Gray*, 227 F.3d 1278, 1291 (10th Cir. 2000) (citing *United States v. Jackson*, 213 F.3d 1269, 1290 (10th Cir. 2000)).

We are convinced that the judge's jury instructions on the intent requirement were not in error. Notwithstanding Rockwell's assertions to the contrary, the trial judge did not instruct the jury that they could only consider the knowledge of the DOE's "contracting officers." Rather, the judge worded his instructions broadly, charging the jury that they could consider the knowledge of all "government employees with authority to act under the contract." Thus, it is clear from the plain language of the instructions that the judge did not limit the relevant pool of DOE employees to "contracting officers"; nor has Rockwell articulated any argument that persuades us that the phrase "government employees with authority to act under the contract" is synonymous with "contracting officers."[11] Consequently, there is nothing in the instructions indicating that the jury was under the impression that they were prohibited from considering Rockwell's evidence that mid and lower-level DOE employees knew of the environmental, health and safety violations at Rocky Flats.

Rockwell knowingly presented a false statement as to those facts. IX App. at 5292-94.

[11] Indeed, the contract between Rockwell and the DOE defines a "Contracting Officer" as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer." VI App. at 1669. Thus, the phrase "government employees with authority to act under the contract" appears to encompass a broader range of individuals than does the contract's quite narrow definition of a "Contracting Officer."

Accordingly, we hold that the trial judge did not err in his jury instructions on the intent requirement.[12]

VII

The Government's breach of contract theory was based on the argument that Rockwell's failure to operate the Rocky Flats facility in compliance with applicable environmental laws represented a breach of contract. To this end, the trial judge instructed the jury:

> The government also alleges that defendant breached the DOE/Rockwell contract through operational failures relating to defendant's production, handling and storage of pondcrete and saltcrete at Rocky Flats. Defendant denies the government's allegations.
>
> For the government to recover on its claim for breach of express contract relating to alleged operational failures, you must find the government has proven all of the following by a preponderance of the evidence.
>
> One, *defendant failed to use its best efforts* in its production, handling or storage of pondcrete and saltcrete.
>
> Two, *such operational failures resulted from willful misconduct or lack of good faith on the part of the plant manager, Mr. Sanchini, or those Rockwell*

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[12] We are convinced that our decision is consistent with the Ninth Circuit's opinion in *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321 (9th Cir. 1995), which Rockwell relies upon. *Butler* rejected the argument that for purposes of determining whether the defendant "knowingly" submitted a false claim to the Government, only contracting officers' knowledge is relevant. Instead, the court held that the knowledge of government "technical representatives" may also be considered.

Because, as discussed above, we find no evidence in the instant case that the jury was instructed to restrict their consideration exclusively to contracting officers, there is no contradiction between *Butler* and our holding here.

> *managerial employees responsible to Mr. Sanchini, thereby breaching the contract.*
>
> And, three, resulting damage to the government caused by the breach of contract.

IX App. at 5299-300 (emphasis added).

Then, the judge re-emphasized to the jury that it could not find Rockwell liable if it found that Rockwell had used its "best efforts" to comply with its obligations under the contract:

> Under the terms of both the 1986 and 1989 DOE/Rockwell contracts, defendant was obliged only to use its best efforts to comply with its responsibilities under the contract. *If the defendant used its best efforts to perform its contractual obligations, then defendant was entitled to receive or retain its costs for what it did in relation to the contract,* and the government may not recover on its claim for breach of contract, despite the failure, if any, of defendant to meet the contractual requirements.

Id. at 5300 (emphasis added).

The Government now argues that the district court erred both by instructing the jury on "best efforts" and by failing to instruct the jury to find Rockwell liable for breach of contract. It contends that because Rockwell's contract with DOE imposed a duty on Rockwell to comply with all applicable environmental laws, including the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992, Rockwell's guilty plea to violations of that statute conclusively establishes that it breached its duties under the contract and that it could not re-litigate that issue.[13] *See*

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[13] For its argument in the nature of collateral estoppel, the Government points to the "Plea Agreement and Statement of Factual Basis" entered in *United States v. Rockwell Int'l Corp.*, No. 92-CR-107, District of Colorado, a document which was admitted in evidence in the instant civil action as Plaintiff's Ex. 1. VI App. at 1861-92.

Reply Br. for Appellee/Cross Appellant the United States, at 6 (citing *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989)). The Government thus argues that the judge "improperly added an intent requirement to the elements of a breach of contract claim" and should have instructed the jury to find that Rockwell breached its contract with DOE.

We are persuaded that the judge did not err in his instructions. We are convinced that both the text of the contracts and relevant case law establish that the "best efforts" instruction was correct. In the section of the contracts entitled "Scope of Work," it was provided:

> The Contractor shall, in accordance with the provisions of this contract, *use its best efforts* to manage, staff, maintain, and operate the Rocky Flats Plant within available funds so as to carry on in an efficient manner all necessary and related services and operations for the purpose of developing and producing (at such rates, and in conformance with such specifications, as the Contracting Officer may direct in writing from time to time) weapons components, assemblies, and ancillary equipment and for performing related services and operations within the time scales requested by the Contracting Officer.

VI App. at 1708 (Appendix B to Contract, at 1) (emphasis added).

We are convinced that this language resolves the question of whether the judge was correct in instructing the jury that Rockwell owed to the DOE only its "best efforts." Moreover, our review of relevant case law confirms that the trial judge did not err in his instructions on this point. For instance, *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 295 (1997), involved an action brought in the United States Court of Federal Claims by defense contractors for equitable adjustment and conversion of termination for default, to one for convenience of the Government. *Id.* In

determining the rights of the contractors and the Government, the trial judge said that the "best efforts" standard summarizes the basic nature of the cost-reimbursement contract, and that such a contract merely requires the contractor to use its best efforts to provide the goods or services at the stated price. *Id.* at 298 (citing *General Dynamics Corp. v. United States*, 229 Ct.Cl. 399, 671 F.2d 474 (1982)). The judge concluded that "[i]f, despite its best efforts, the contractor cannot meet its contractual requirements, the government has obtained precisely what it bargained for, namely the contractor's best efforts...." *McDonnell Douglas*, 37 Fed. Cl. at 298.

Although the Government, in developing its collateral estoppel theory, relies on *Sell v. United States*, 336 F.2d 467, 475 (10th Cir. 1964), and *United States v. Rivera Ramos*, 856 F.2d 420, 420 (1st Cir. 1988), *cert. denied*, 493 U.S. 837, 110 S.Ct. 118, 107 L.Ed.2d 79 (1989), we are not persuaded. In *Sell*, this court stated that findings in a criminal case were admissible in the civil case at issue under res judicata or estoppel by judgment principles, "*insofar as such findings determined issues identical to both cases.*" *Sell*, 336 F.2d at 475 (emphasis added, footnote omitted). We feel, however, that the issue of fact about making "best efforts" here to comply with the contractual duty is not the same as the fact issues determined by the guilty plea in the criminal case. Consequently, although Rockwell did previously plead guilty to violating the Resource Conservation and Recovery Act,[14] we are convinced that this plea did not, as the Government contends, preclude the jury from finding that

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[14] Specifically, in Count One of the plea agreement, Rockwell pleaded guilty to "Knowing Storage Of Mixed Hazardous Wastes (Pondcrete and Saltcrete) in Violation of RCRA Requirements, 42 U.S.C. § 6928(d)(2)(C)"; and in Count Two, Rockwell pleaded guilty to "Knowing Storage Of Mixed Hazardous Wastes (Pondcrete and Saltcrete) without a Permit or Interim Status, in Violation of RCRA, 42 U.S.C. § 6928(d)(2)(A)." *See* note 17, *supra*.

Rockwell engaged in its best efforts and thus that it complied with its obligations under the contract.

After careful consideration of this issue, we are of the opinion that a reasonable jury could find (and in this case, did find) that a defendant who violated applicable laws nonetheless used its best efforts to fulfill its obligations under the contract, and thus find that no breach occurred.[16] Accordingly, we hold that the trial judge did not err by not instructing the jury to find that Rockwell breached its contract with the DOE.

VIII

In sum, we are persuaded that the rulings of the district court should be affirmed on all issues except the issue of pre-filing disclosure discussed in Part II E. As to that issue only, the cause is remanded to the district court for the limited purpose of determining whether Mr. Stone satisfied the pre-filing disclosure prong of the "original source" test in compliance with the statute which requires the *qui tam* relator to have voluntarily provided the information before filing suit. *See United States ex rel. King v. Hillcrest Health Center*, 264 F.3d 1271, 1280 (10th Cir.2001).

As the Supreme Court made clear in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), *qui tam* relators do not lack Article III standing. The FCA's *qui tam* provisions do not violate Article II's Appointments Clause, nor its Take Care Clause, at least where the Government intervenes. The court did not abuse its discretion in denying the Plaintiffs' motion for a new trial for damages. Nor did it abuse its discretion in providing that the Government's dismissal of its common law fraud claim must be with prejudice. Finally, the court did not err in its jury instructions concerning either the knowledge of DOE

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[16] Of course, a jury could also find that the defendant did not use its best efforts, and thus that it breached its contract.

officials or whether the contract obligated Rockwell only to use its "best efforts."

Accordingly, we **affirm in part and remand for the limited purposes we note.** This court will retain jurisdiction of these appeals pending the district court's proceedings and further ruling on the pre-filing disclosure requirement, following which a supplemental record shall be certified to this court for final disposition.

If the trial judge finds there was no proper pre-litigation disclosure to the Government by Stone, the judgment for the Government will be modified as the statute requires and the judgment for Stone vacated. If the judge finds there was proper disclosure by Stone to the Government, the judgment for Stone and the Government will stand. This court retains jurisdiction to make its final disposition after review of the supplemental record.

IT IS SO ORDERED.

BRISCOE, Circuit Judge, concurring and dissenting.

I agree with the majority's resolution of every issue except for its conclusion that James Stone qualifies as an "original source" under 31 U.S.C. § 3730(e)(4)(B). In my view, Stone has established only that he had direct and independent knowledge of background information pertaining to Rockwell's pondcrete operations, and thus fails to qualify as an "original source" under § 3730(e)(4)(B).

The False Claims Act defines the term "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). We have further defined both the type and kind of knowledge that an original source/relator must have. In *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999), we held that to satisfy the "direct and independent knowledge" requirement, a relator must

offer more than "secondhand information, speculation, background information or collateral research." Instead, we held, the relator "must allege specific facts...showing exactly how and when he or she obtained direct and independent knowledge of the *fraudulent acts alleged in the complaint* and support those allegations with competent proof." *Id.* at 1162 (emphasis added). We recently reaffirmed the type and kind of knowledge required of a relator in *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271 (10th Cir. 2001), emphasizing that the phrase "information on which the allegations are based" refers to "*any* essential element of the [underlying] fraud transaction." *Id.* at 1280 (internal quotations omitted).

Count One of the amended complaint, asserted jointly by the United States and Stone, alleged that Rockwell violated the FCA by "knowingly presenting or causing to be presented to the government false or fraudulent claims for money or property." App. at 995. Count One focused on three separate environmental, safety and health violations which Rockwell allegedly concealed from the government. The jury ruled in favor of Stone and the government on one of the three claims in Count One. The jury concluded Rockwell had submitted false claims to the DOE in violation of the Act as regards its pondcrete and saltcrete operations and awarded damages.

The question before us is whether Stone qualifies as an "original source" with respect to the portion of the Count One FCA claims upon which he and the government prevailed at trial. Those prevailing claims focused on Rockwell's submission to the DOE of false statements regarding its pondcrete and saltcrete operations between April 1, 1987 and September 30, 1988. As outlined above, Stone must demonstrate, in part, that he had direct and

independent knowledge of one or more of the essential elements of those claims.[1]

It is undisputed that Stone possessed significant background information regarding Rockwell's pondcrete operations. According to Stone, managers at the Rocky Flats facility began considering the idea of producing pondcrete, in order to dispose of sludge from the facility's solar ponds, in the fall of 1982. At that time, Stone was assigned the task of studying "aspects of the design proposed by Rockwell management for making pondcrete." App. at 298. "After careful study, [he] concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment." *Id.* Stone communicated his concerns to Rockwell management in a written memo. *Id.* at 298, 439 ("This design will not work, in my opinion."). According to Stone, Rockwell management nevertheless "went forward with the project without making the changes necessary...to eliminate the instability of the pondcrete blocks." *Id.* at 299.

Notwithstanding Stone's background knowledge, there is no evidence that he directly and independently knew about the actual problems that arose with the pondcrete after it was produced or Rockwell's efforts to conceal those problems from the DOE. Indeed, Stone was terminated from his employment with Rockwell well before either event occurred. Thus, although Stone predicted that

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[1] I note the first claim in Stone's initial complaint, filed July 5, 1989, was much broader than Count One of the amended complaint upon which Stone and the government ultimately prevailed. Judge Carrigan's ruling that Stone was a relator under the FCA pertained to Stone's initial complaint. Our focus in this appeal is on Count One of the amended complaint and whether Stone is a relator as regards those claims. See *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1164 n. 10 (10th Cir. 1999).

problems would occur with the production of pondcrete,[2] and perhaps may have speculated that Rockwell would conceal any such problems from the government, it is apparent that he lacked the "direct and independent" knowledge required by the FCA's "original source" provisions. *Cf. United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 163 F.3d 516, 526 (9th Cir. 1999) (concluding relator who offered only speculation and conjecture that defendant committed the alleged fraud did not qualify as an original source); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) (concluding that plaintiff, who performed collateral research and possessed background information which enabled him to understand the significance of publicly disclosed information, did not qualify as an original source). More specifically, Stone lacked direct and independent knowledge of any of the essential elements of the Count One claims, i.e., that Rockwell actually experienced problems in its production of pondcrete, that Rockwell failed to disclose those problems to the government and in fact represented to the government that there were no environmental problems at Rocky Flats, or that Rockwell knowingly concealed the true state of affairs in order to obtain benefits under its contract with the government. *See United States v. Mackby*, 261 F.3d 821, 826 (9th Cir.2001) (concluding that the government must prove three elements to establish a cause of action under the FCA:

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[2] The majority suggests that, in light of the conclusions reached by Stone in 1982, Rockwell was "aware[ ] that it would be using a defective process for manufacturing pondcrete." Maj. Op. at 802. I think this stretches the evidence too far. Although Rockwell was clearly aware of Stone's opinions, it is entirely plausible that Rockwell management nevertheless believed the proposed pondcrete manufacturing process would work. In any event, it is not Rockwell's decision to go forward with the proposed manufacturing process that gave rise to the Count One FCA claims. Rather, the Count One FCA claims are based on Rockwell's concealment of actual problems that arose after the manufacturing process began.

(1) a "false or fraudulent" claim, (2) which was presented, or caused to be presented, by the defendant to the United States for payment or approval, and (3) with knowledge that the claim was false). This conclusion is made clear when one considers that the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome of the Count One FCA claims.

Because I conclude that Stone cannot qualify as an "original source" with respect to the successful Count One FCA claims, I would reverse the judgment of the district court and remand the case with directions to dismiss Stone's portion of the Count One FCA claims for lack of subject matter jurisdiction.

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.
UNITED STATES OF AMERICA, EX REL. JAMES S. STONE, AND UNITED STATES OF AMERICA,
PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS,
v.
ROCKWELL INTERNATIONAL CORP., AND BOEING NORTH AMERICAN, INC.,
DEFENDANTS-APPELLANTS AND CROSS-APPELLEES.
AMERICAN HOSPITAL ASSOCIATION, NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, ELECTRONIC INDUSTRIES ALLIANCE, AMICI CURIAE.
Nos. 99-1351, 99-1352, 99-1353.

March 5, 2004.

Before BRISCOE, HOLLOWAY and HARTZ,* Circuit Judges.

ORDER AND JUDGMENT**

HOLLOWAY, Circuit Judge.

ORDER AFTER LIMITED REMAND

The disposition of the instant appeals by published opinion for a divided panel was suspended on petition for rehearing, and the panel ordered a limited remand for findings and conclusions to ascertain whether the Relator, Mr. Stone, had satisfied the statutory requirement[1] of disclosing the information underlying his claims to the government prior to bringing this lawsuit. Our opinion, as modified on rehearing, is reported. *United States, ex rel.*

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* Judge Hartz has replaced the late Judge Politz on the panel.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] *See* 31 U.S.C. § 3730(e)(4).

Stone v. Rockwell International Corp., 282 F.3d 787 (10th Cir. 2002). We will not attempt to summarize in this order the complex factual and legal background of this matter which is outlined in that opinion.

To proceed in accord with our remand order, the district court first received submissions from the parties consisting of motions supported by briefs, excerpts from the record, and additional material submitted by defendant Rockwell. The court then held a hearing on November 25, 2002, at which all counsel agreed that the record was adequate to enable the judge to make the findings and conclusions necessary. The judge made his findings and conclusions shortly after the hearing, addressing Mr. Stone's claims in three areas: pondcrete, saltcrete, and spray irrigation.[2]

As to the spray irrigation claims, the district court found that Mr. Stone had not made disclosure or at least not sufficiently specific disclosure. Defendant avers that this point is moot because the verdict for the time frame including this claim was in its favor. We agree.[3] Thus, we need not concern ourselves with the district court's finding on this point.

Judge Matsch noted that Mr. Stone had conceded that he did not make pre-filing disclosure to the government of any knowledge he may have had underlying his claims with respect to "saltcrete." In its supplemental briefing submitted to this panel after the district court's completion of its task, defendant Rockwell does not suggest that this concession should have any effect on the judgment. In any event, from review of the record we have determined that the saltcrete and pondcrete allegations centered on the same time periods.[4] Consequently, if disclosure was made as to

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[2] These terms are explained in our published opinion.

[3] *See Pretrial Order*, IV App. 1063, 1095 at ¶ 14 (setting out the time frame for plaintiff's spray irrigation claim); *id.* at 1119 (jury verdict form finding for defendant on claim covering that time period).

[4] *See* Pretrial Order, IV App. Tabs C & D, 1063, 1097-99.

pondcrete, that would establish jurisdiction for the critical time period for which the jury awarded damages.

Thus, the real point of contention now is whether Stone disclosed the facts underlying his "pondcrete" claims to the government before commencing this suit.[5] On this issue, the district court made one especially significant finding–that a certain document had been produced to the government by Stone prior to suit having been filed. This document, an "Engineering Order" that Stone had attached as an exhibit to an affidavit filed in the district court, was noted in our previous opinion. The Engineering Order itself was an internal Rockwell document concerning pondcrete. On the Order, Stone had made these handwritten comments: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation...." 282 F.3d at 801.

Our view of this notation, as expressed in our opinion, is of critical importance in the present inquiry. We said, "This Engineering Order was explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed." *Id.*

The district court, however, took a different view of the document:

> His comment does not address whether the design to which he objects is for the method of pumping the ponds, the manufacture of pondcrete blocks or both. The document does not speak for itself and to find that Mr. Stone communicated his concerns to the government about the manufacture of pondcrete before the filing of this civil action requires the court to speculate about the content of conversations he had with the FBI and EPA agents and the Assistant United States Attorney.

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[5] It is worth noting that the United States did not contend in the district court that Mr. Stone had failed to make the necessary disclosures to the government.

Findings and Conclusions at 5. The judge then referred to the FBI agent's reports of interviews, known as 302 reports. The judge said that 302 reports

> are merely summaries of the agent's recollections of the conversation, but it is also fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the pondcrete blocks that later became the principal issue litigated at trial, there would be some reference to it in the agent's reports.

Id. at 5-6.

We conclude that the district judge erred in holding that the production of the document was insufficient to support a finding that Mr. Stone had communicated his concerns about the manufacture of pondcrete to the government before filing his action. This holding violated the law of the case, *see, e.g., Huffman v. Saul Holdings Ltd.*, 262 F.3d 1128, 1132 (10th Cir. 2001), because it is fundamentally irreconcilable with our previous holding, quoted above, about the import of the document.[6] *Our previous holding about the import of the document, together with the district court's finding on remand that the document had been produced to the government before suit was filed, are sufficient to carry Stone's burden of persuasion on this point.*[7]

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[6] As appellant puts it:

> [T]he District Court expressly found that Mr. Stone had provided to the Government in March 1988–over a year *before* this action was filed–the very same documents on which this Court based its prior ruling that Mr. Stone satisfied the "direct and independent knowledge" prong of the original source test. This finding alone warrants denial of Rockwell's motion.

Plaintiff-Appellee/Cross-Appellant James S. Stone's Response at 1. *See also* Plaintiff-Appellee's March 7, 2003 Reply in Support of Cross-Motion For a Ruling Affirming the Judgment in its Entirety at 5.

[7] We find irrelevant the district court's inference that the document was not discussed with the FBI. As noted above, the court said that "if Mr. Stone attached such importance" to the subject, then it would be a fair inference that the 302 report would contain some reference to the

Therefore, we hold that the jurisdictional disclosure requirement was satisfied. In accordance with our previous opinion, the judgment of the district court is **AFFIRMED.** Mr. Stone's pending motion to supplement the record is **DENIED** as moot. Rockwell's motion for an order vacating the judgment of the district court is **DENIED.**

IT IS SO ORDERED.

BRISCOE, Circuit Judge, dissenting.

I respectfully dissent. In my view, the district court's factual findings on remand reinforce the unmistakable conclusion that Stone cannot establish that he qualifies as an "original source" under 31 U.S.C. § 3730(e)(4)(B). I therefore again conclude that Stone's claims should be dismissed for lack of subject matter jurisdiction.

As "the party invoking federal jurisdiction," Stone bore "the burden of alleging facts essential to show jurisdiction under the False Claims Act [FCA]." *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1202 (10th Cir. 2003) (en banc) (internal quotations omitted). Because his claims under the FCA were based on publicly disclosed information, in order to establish subject matter jurisdiction, Stone was required to prove he was "an original source of th[at] information." 31 U.S.C. § 3730(e)(4)(A). To do so, Stone first had to prove he "ha[d] direct and independent knowledge of the information on which [his]

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subject. There is no statutory requirement that the relator have emphasized the specific facts on which a claim is later based, so long as the facts are disclosed.

Considering the volume of documents Stone produced to the government, and the number and scope of activities about which he was concerned, it would be unsound to draw the inferences made from an FBI agent's summarization of a meeting, as Judge Matsch himself had indicated on taking the case under advisement at the close of the hearing on remand. (It seems clear that Stone attached importance to all of the disclosures he made to the government concerning possible environmental consequences of mishandling of extremely hazardous materials, although the only relevant inquiry is whether he satisfied the disclosure requirements.)

allegations [we]re based." 31 U.S.C. § 3730(e)(4)(B). In other words, Stone had to prove he had direct and independent knowledge of "any essential element of the [underlying] fraud transaction." *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001) (internal emphasis and quotation omitted). Stone also had to prove he "voluntarily provided the information to the Government" before filing his *qui tam* action. 31 U.S.C. § 3730(e)(4)(B).

Count One of the amended complaint, asserted jointly by the United States and Stone, alleged generally that Rockwell violated the FCA by "knowingly presenting or causing to be presented to the government false or fraudulent claims for money or property." App. at 995. In particular, Count One alleged that, during the course of ten six-month contract award periods (running from October 1, 1986, through December 30, 1989), Rockwell concealed from the DOE environmental, safety, and health problems related to the processing and storage of pondcrete and saltcrete. At trial, the jury found Rockwell had violated the FCA during three of the contract award periods at issue and awarded $1,390,775.80 in damages (an amount equal to ten percent of the total fee award bonuses received by Rockwell during the three contract award periods).

In my dissent to the original panel opinion, I outlined why Stone had failed to establish he was an "original source" with respect to these prevailing FCA claims. In short, I concluded that although Stone had accurately predicted in a 1982 "Engineering Order" written during the course of his employment that Rockwell's proposed design for making pondcrete would not work, App. at 439, there was no evidence that he directly and independently knew that Rockwell actually experienced problems when it began producing pondcrete or that Rockwell concealed the resulting environmental problems from the DOE. Not only did Stone's employment with Rockwell end well before

either event occurred, his Engineering Order addressed neither the failure of pondcrete when it was later produced nor Rockwell's concealment of that failure from the DOE. The Engineering Order did not address these points for the simple reason it could not address events that had not yet occurred.

Although the district court's task on remand was focused solely on determining whether Stone had satisfied the "disclosure" component of the "original source" rule, its findings reinforce the conclusions I reached in my original dissent. Specifically, the district court found that, prior to filing suit, the only information possessed by Stone and provided to the government concerning pondcrete was the 1982 Engineering Order in which Stone opined that the company's proposed design for making pondcrete was flawed. The majority concludes disclosure of the Engineering Order to the government satisfies the "disclosure" component of the "original source" rule. I disagree. Because the Engineering Order only conveyed Stone's professional opinion that the proposed pondcrete design would not work, the fact that he provided a copy of the Engineering Order to the government in March 1988 did not satisfy the "disclosure" component of the § 3730(e)(4)(B) "original source" rule. Aside from providing the Engineering Order to the government, there is no evidence that, prior to suit, Stone informed the government, or was even aware, that Rockwell actually experienced problems with its pondcrete production and concealed such problems from the DOE. Thus, Stone cannot qualify as an "original source" and his FCA claims should be dismissed for lack of subject matter jurisdiction.

[Here the Court reprints its Order on Rehearing, published at 282 F.3d 787, and reprinted herein at Pet. App. 1-48a.]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 99-1351, 99-1352 & 99-1353

UNITED STATES OF AMERICA, *ex rel.* JAMES S. STONE, and UNITED STATES OF AMERICA,

Plaintiff-Appellees and Cross-Appellants,

v.

ROCKWELL INTERNATIONAL CORP., and BOEING NORTH AMERICAN, INC.,

Defendants-Appellants and Cross-Appellees,

and

AMERICAN HOSPITAL ASSOCIATION, NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, ELECTRONIC INDUSTRIES ALLIANCE,

Amici Curiae.

ORDER DENYING REHEARING AND REHEARING EN BANC

Filed January 4, 2006

Before **BRISCOE, HOLLOWAY** and **HARTZ,** Circuit Judges

We have a petition for rehearing with a suggestion of rehearing en banc filed by Rockwell. The petition for panel rehearing is denied by Judges Holloway and Hartz, with Judge Briscoe voting to grant rehearing. A poll was requested on the suggestion of rehearing en banc, and that suggestion is now denied, a majority of the active circuit judges not having voted for rehearing en banc. Chief Judge Tacha, Judge Kelly, Judge Briscoe, Judge O'Brien and Judge McConnell voted to grant rehearing en banc. Judge Tymkovich recused.

Entered for the Court

by: /s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 89-C-1154

UNITED STATES OF AMERICA ex rel. JAMES S. STONE,

Plaintiff,

v.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.

[ENTERED]
[February 2, 1994]
[JAMES R. MANSPEAKER, CLERK]
[US. DISTRICT COURT]

ORDER

CARRIGAN, J.

Qui tam plaintiff James S. Stone commenced this action on behalf of the United States pursuant to the False Claims Act (FCA), 31 U.S.C. § 3729 et seq., naming Rockwell International Corporation as the defendant. Pursuant to Fed. R. Civ. P. 12(b)(1), Rockwell has moved to dismiss Mr. Stone's claim for lack of subject matter jurisdiction. Mr. Stone opposes that motion.

The issues have been fully briefed and oral argument was heard on January 5, 1994. Jurisdiction exists under 28 U.S.C. § 1331.

I. FACTUAL BACKGROUND.

This case arises out of Rockwell's operation of the Department of Energy's (DOE) nuclear weapons production

facility at Rocky Flats, Colorado. Mr. Stone worked as an engineer at Rocky Flats from November 10, 1980 until March 1986. He asserts that following his discharge, he informed agents of the Federal Bureau of Investigation (FBI) of various environmental, health and safety improprieties at Rocky Flats.[1]

The gravamen of Mr. Stone's suit is his claim that Rockwell concealed from the DOE violations of environmental, health and safety laws, regulations and standards so that it could continue to receive payments and bonuses.

II. ANALYSIS.

The FCA imposes civil liability on any person who, inter alia, knowingly presents a false claim for payment or makes a false record to get a false claim paid. 31 U.S.C. § 3129. It also authorizes private citizens to bring civil actions on behalf of the United States. 31 U.S.C. § 3730(b).

The Act, however, provides that:

> "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing ... or from the news media, unless ... the person bringing the action is an original source of the information." § 3730(e)(4)(A).

An original source is:

> "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." § 3730(e)(4)(B).

This "original source" requirement applies even if a qui tam plaintiff's allegations are based only partly upon

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[1] Mr. Stone met with the FBI on at least three occasions and had numerous telephone calls with the Bureau. In March 1988 he turned over 2300 pages of documents to the FBI.

publicly disclosed allegations or transactions. United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992), cert. denied, 113 S. Ct. 1364 (1993). Mr. Stone's allegations involve incidents that were widely covered in the news media; therefore he must satisfy the "original source" requirement.[2]

Section 3730(e)(4)(B) imposes two plain and unambiguous jurisdictional requirements. Precision Co., 971 F.2d at 553. First, a qui tam plaintiff must show that he has direct and independent knowledge of the information on which his allegations are based. Id. Second, he must show that he provided that information to the government prior to filing suit.

Rockwell makes two arguments. First, it contends that Mr. Stone must show that he possessed direct and independent knowledge of Rockwell's alleged fraudulent statements or conduct, not merely violations of environmental, health and safety standards. Second, it argues that the FCA imposes a third jurisdictional requirement – that a qui tam plaintiff played a part in the original public disclosure of that information.

A. Direct and Independent Knowledge of Actual Fraud.

In response to interrogatories, Mr. Stone acknowledged that he did not know the specific persons who allegedly falsely told the government that Rockwell was in compliance with environmental, health and safety laws. He also acknowledged that he could not identify the specific documents containing such misrepresentations. Finally, Mr. Stone admitted in his deposition that he had no direct personal knowledge of Rockwell presenting false claims for payment.

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[2] Much of the media coverage came in June 1989, after the FBI executed a search warrant at Rocky Flats. The search warrant was supported by an affidavit signed by the agent with whom Mr. Stone had met.

Based on these admissions, Rockwell asserts that, at most, Mr. Stone had direct and independent knowledge of environmental, health and safety violations, not the acts that constituted the actual fraud – alleged misrepresentations and fraudulent demands for payment. Therefore, Rockwell contends, Mr. Stone is not an original source.

Mr. Stone's duties at Rocky Flats included plant-wide troubleshooting through which he gained knowledge of various environmental, health and safety problems. In addition, Mr. Stone was informed that Rockwell's compensation was based on compliance with applicable environmental, health and safety regulations. He was given a document stating that the "DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs," including Nuclear Materials Management, Waste Management, Health Protection, Industrial Safety and Environmental Protection. Further, he was instructed not to divulge environmental, health and safety problems to the DOE.

Thus there is evidence that Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments. The fact that Mr. Stone was not aware of the specific persons or documents involved does not erase this knowledge.

As a result, I conclude that Mr. Stone possessed direct and independent knowledge of the informat on on which the allegations are based.

B. Source of Original Public Disclosure.

Rockwell argues that Mr. Stone also must demonstrate that he played a part in the original public disclosures of the information on which his allegations are based. Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992) ("To bring a

qui tam suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit."); United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990) ("(A) plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.").

Dick purported to find this third requirement, not in the definition of original source, § 3730(e)(4)(B), but in the legislative history of the 1986 amendments. 912 F.2d at 17-18. To gain entrance to that history it first had to conclude that the word "information" does not mean in § 3730(e)(4)(A) what it means in S 3730(e)(4)(B). Id. at 16-17. Reaching this conclusion required the court to disregard the rule that identical words used in the same section are presumed to mean the same thing. Id. at 16. Only after doing so could the court give effect to its interpretation of congressional intent by adding a third requirement to the definition of original source that was not included in the statute's text.[3]

The Tenth Circuit has not addressed the merits of this third requirement. Precision Co., 971 F.2d at 553 n.4. It has noted, however, that:

> "Two jurisdictional requirements are evident from the plain language of [§ 3730(e)(4)(B)]: 1) a qui tam plaintiff must have direct and independent knowledge of the information on which the allegations are based; and 2) a qui tam plaintiff must have voluntarily provided such information to the government prior to filing suit. These requirements are plain, unambiguous and require no further scrutiny. Id. at 553 (emphasis added).

This passage does not address directly the question presented here. It does, however, indicate that courts

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[3] Section 3730(e)(4)(A) provides that suits based on public information are barred unless the plaintiff "is an original source of the information." Dick and Wang append the words "that was publicly disclosed" to the end of this sentence.

should confine their interpretations of the original source rule to the plain meaning of the text. While legislative history might be useful in interpreting the explicit requirements, it reaches too far to use that history to add a requirement that is not in the text.

As a result this court is left with no alternative but to conclude that § 3730(e)(4)(B) contains the universe of requirements for original source status and that Mr. Stone satisfies those requirements.[4]

Accordingly IT IS ORDERED that:

(1) Defendant's motion to dismiss for lack of subject matter jurisdiction is denied; and

(2) The parties and their counsel are ordered to meet and confer within eleven days of this order in a good faith attempt to settle the case without further litigation, expense or delay. The parties shall report to this court in writing within fifteen days of this order, stating the results of their settlement negotiations and whether a conference before a Magistrate Judge or some other alternative dispute resolution proceeding would facilitate settlement.

Dated at Denver, Colorado February 2, 1994

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

[4] In light of this holding the court need not address whether Mr. Stone would be an original source under the Wang/Dick standard.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and
UNITED STATES OF AMERICA,
ex rel. JAMES STONE,

Plaintiffs,

vs. 89 M 1154

ROCKWELL INTERNATIONAL
CORPORATION, et al.,

Defendant.

ORAL ARGUMENT ON JUDGMENT ISSUES
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARI P. MATSCH, U. S. District Judge for the District o Colorado, beginning at 10:56 a.m. on the 7th day of May 1999, in Courtroom C-204, United States Courthouse Denver, Colorado.

* * *

THE COURT:

* * *

And we have yet left this matter of whether James Stone, and on the present state of the record, i properly a relator. The ruling that was made by Judge Carriga early on in this case, I am going to adhere to. And thes arguments about whether that ruling is somehow affected by th

evidence
that was heard at the trial and by the subsequent developments in the case, I understand the defendant's argument that the claims that actually went to trial were not the claims that he was making at the time of Judge Carrigan's ruling, but I'm not going to revisit all that. I'm going to adhere to the ruling previously made in the case, and say that James Stone is properly a relator under the False Claims Act, and that can be reviewed on appeal.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.*
JAMES S. STONE, AND UNITED STATES OF AMERICA,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION and BOEING NORTH AMERICAN, INC.,

Defendants.

[FILED]
[MAY 13, 1999]
[JAMES R. MANSPEAKER, CLERK]
[U.S. DISTRICT COURT]

ORDER FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(B)

On April 1, 1999, a duly empaneled jury of twelve members returned a verdict for the plaintiffs on three claims of violation of the False Claims Act and awarded compensatory damages of $1,390,775.00 on those claims. The jury found for the defendants on the other seven False Claims Act claims and the claim of the United States for breach of contract. At a hearing held on May 7, 1999, based on all of the evidence received at trial, the court ruled that, as a matter of law, judgment should enter for the defendants

on the equitable claims of the United States for unjust enrichment and recovery of payments made by mistake because the remedy at law is adequate, the evidence fails to support those claims and such remedies would be inconsistent with the jury verdict for the defendants on the claim for breach of contract. The court also ruled that judgment should enter for the defendants, as a matter of law, under Fed. R. Civ. P. 50(a) on the claim of the United States for damages for common law fraud, a claim that was not submitted to the jury because the government withdrew it. In the alternative, considering the oral motion to withdraw as a motion under Fed. R. Civ. P. 41(a)(2), the court orders that dismissal of the claim must be with prejudice.

The separate claims for violations of the False Claims Act by the relator, James S. Stone, in Count Six of the Amended Complaint, filed December 20, 1996, are determined to be separate and independent claims within the meaning of Fed. R. Civ. P. 54(b), which should be stayed until after final disposition of any appeals from the judgment to be entered pursuant to this order. The court expressly determines that there is no just reason for delay in the entry of judgment on the other claims. The court expressly adheres to the February 2, 1994 ruling of Judge Jim R. Carrigan that James S. Stone is properly a *qui tam* relator in this civil action and denies the challenge to the constitutionality of that statute in the defendants motion to dismiss filed on May 5, 1999.

The court now finds and concludes that a civil penalty of $5,000.00 for each of the False Claims Act violations found by the jury, for a total penalty of $15,000.00 is appropriate under 31 U.S.C. § 3729(a) and that the jury's award of compensatory damages must be trebled under that statute.

Upon the foregoing, it is now

ORDERED that the Clerk of this Court shall enter a final judgment under Fed. R. Civ. P. 54(b) awarding the plaintiffs compensatory damages of $4,172,325.00; and for the payment to the United States of a civil penalty of $15,000.00 on Count One of the Amended Complaint, and the judgment shall enter for the defendants dismissing, with prejudice, Counts Two through Five of the Amended Complaint. The judgment shall direct that any party seeking costs must file a bill of costs within 10 days from entry of judgment.

DATED: May 13th, 2006

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE RICHARD P. MATSCH

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA and
UNITED STATES OF AMERICA *ex rel.* James S. Stone,

Plaintiffs,

v.

ROCKWELL AUTOMATION, INC. and
BOEING NORTH AMERICAN, INC.,

Defendants.

[FILED]
[DEC. 17, 2002]
[JAMES R. MANSPEAKER, CLERK]
[U.S. DISTRICT COURT]

FINDINGS AND CONCLUSIONS ON LIMITED REMAND

After holding that James S. Stone ("Mr. Stone" or "Relator") adequately proved that he had direct and independent knowledge of his allegation that Rockwell International Corp. ("Rockwell"), manufactured insolid pondcrete and concealed it from the govei nment in satisfaction of that requirement as an original source under the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), the Tenth Circuit Court of Appeals ordered this court to make findings and conclusions to determine whether Mr. Stone satisfied the pre-filing disclosure prong of the "original source" test,

31 U.S.C. § 3730(e)(4)(B) and ordered a limited remand to conduct such further proceedings as may be necessary and then supplement the record on appeal. More specifically, the court identified the purpose of the limited remand as follows:

> The limited remand to the district court is for the purpose of that court making findings of fact and conclusions concerning the issue of disclosure prior to filing of this action in accordance with the False Claims Act, concerning the saltcrete, pondcrete and irrigation matters and any further proceedings in the district court which the District Judge deems necessary in connection therewith.

United States, ex rel. Stone v. Rockwell International Corp., 282 F.3d 787, 792 (10th Cir. 2002).

Mr. Stone then filed in this court a motion for a finding that he had made the requisite disclosures to the government before filing this action. The defendants filed their response and the Relator filed a reply. The parties submitted three volumes of excerpts from the appellate record and the defendants filed an additional record on remand including an affidavit of Kenneth A. Thompson, with attachments, which the court rejected by sustaining the Relator's objection to it. The additional record also included an affidavit of Richard J. Ney, attesting to a copy of an opinion of the Board of Contract Appeals of the Department of Energy which this court holds is irrelevant. The other portions of the additional record are copies of pleadings and other materials to which there has been no objection.

At oral argument held on November 25, 2002, all counsel agreed that this court's findings and conclusions should be made based on the record contained in these submissions without the need for any additional evidentiary hearing.

The Relator concedes that he did not provide any information to any government representatives concerning claims relating to saltcrete.

The Relator's position as to pondcrete is that what he provided to government representatives before filing his complaint on July 5, 1989, is the same information cited by the Court of Appeals in holding that Mr. Stone had direct and independent knowledge on that subject. The defendant disputes that contention and asserts that while Mr. Stone knew that the design for the removal of sludge from holding ponds and mixing it with cement to form blocks was defective and would result in deterioration and leakage of toxic material, he did not communicate his knowledge to any government representative. To resolve that dispute, this court has carefully considered the record excerpts provided and makes the following findings of fact using the standard of a preponderance of evidence with the burden of persuasion being on Mr. Stone.

In response to the Rockwell motion to dismiss under Fed.R.Civ.P. 12(b)(1), Mr. Stone filed his affidavit addressing the issue of his direct and independent knowledge of the allegations set forth in his original complaint. The Court of Appeals specifically relied on that affidavit in its *de novo* review of Judge Carrigan's ruling as to the first prong of the original source test. The affidavit appears beginning at Page 290 in Volume I of the excerpts from the record. The paragraphs pertinent to pondrete are paragraphs 14 and 15 describing what Mr. Stone learned about plans for manufacturing pondcrete and his communications to Rockwell management.

> 14. This sludge and remaining liquid needed to be disposed of in a non-hazardous manner. In or about October 1982, I was assigned to a project addressing the proper manufacturing process for "pondcrete." Pondcrete is a mixture of cement with the sludge and liquid from the evaporation ponds to form large blocks. The blocks can be stored at Rocky Flats or shipped to other sites for disposal. In forming these blocks, it is necessary that the mixture

be such that the blocks are stable and do not fall apart and contaminate the surrounding environment. As assigned, I studied aspects of the design proposed by Rockwell management for making pondcrete. After careful study, I concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment. I also noted, based on my knowledge of the chemical processes at Rocky Flats, that the sludge and liquid present in the evaporation ponds contained some of the most toxic and radioactive substances at Rocky Flats, which made the unstable nature of the pondcrete particularly hazardous. (See, Exhibit B, Attachment 1, Items 2 & 3)

15. I communicated my concerns about pondcrete to Rockwell management. On October 13, 1982, I told my superiors that the suggested design would not work. A copy of that communication is attached as Exhibit E. As is noted at the bottom of that document, my superior, Bob Jensen, concurred in my opinion. Despite its knowledge that the pondcrete would not be stable and that dangerous toxins would be released into the environment, Rockwell went forward with the project without making the changes necessary (some of which I proposed) to eliminate the instability of the pondcrete blocks. Vol. 1, pp. 298-299.

Exhibit B, Attachment 1, items 2 and 3 is a copy of the plaintiffs} conso idated answers and responses to discovery in 1992 providing factual bases for claims of contract violations and criminal charges as directed by a magistrate judge in the course of discovery in this litigation.

A key document relied on by Mr. Stone is his notation oi the engineering order which appears as Exhibit E to th affidavit and is at Page 439 of Volume I of the record.

> This design will not work, in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operation. See L. Fong or L. Eng for details of my objections & potential alternatives. Jim Stone 10-13-82

In his affidavit, Mr. Stone described his meetings with FBI Agent Lipsky and representatives of the Environmental Protection Agency and on one occasion with an Assistant United States Attorney. Mr. Stone also wrote that he provided the FBI with over 2,300 pages of documents. Mr. Stone called particular attention to an FBI report by Agent Lipsky summarizing a June 25, 1987, meeting with him and EPA Agent William F. Smith. A copy is Exhibit M to the Stone affidavit. Nothing in that document refers to pondcrete. Exhibit N is Agent Lipsky's report of a meeting with Mr. Stone, his attorney, an EPA agent and an Assistant U. S. Attorney on February 17, 1988. The discussion concerned Berylium dust exposure and incinerators. There is no mention of pondcrete.

In his affidavit, Mr. Stone refers to providing the FBI with copies of pleadings filed by him in his state court lawsuit against Rockwell in the District Court of Jefferson County, Colorado. That complaint does not include allegations regarding pondcrete.

While there is no specific identification of all of the documents provided to the FBI by Mr. Stone, it is fair to infer that they included the engineering order at Page 439 of the record. His comment on that document does not address specifically the plans for mixing the sludge and cement to form the pondcrete blocks. His comment does not address whether the design to which he objects is for the method of pumping the ponds, the manufacture of pondcrete blocks or both. The document does not speak for itself and to find that Mr. Stone communicated his concerns to the government about the manufacture of pondcrete before the filing of this civil action requires the court to speculate

about the content of conversations he had with the FBI and EPA agents and the Assistant United States Attorney.

It is recognized that the FBI agent's 302 reports are merely summaries of the agent's recollections of the conversation, but it is also fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the pondcrete blocks that later became the principal issue litigated at trial, there would be some reference to it in the agent's reports.

At the time of filing of his complaint, Mr. Stone's counsel submitted a disclosure statement of material evidence and information, referred to in the Tenth Circuit's opinion. As the court noted, paragraph 14 of that statement described Mr. Stone's knowledge and information regarding the design for the system for removing sludge from solar evaporation ponds and the preparation of the pondcrete blocks. The court quoted the language from the disclosure statement at page 509 of the appendix: "Mr. Stone foresaw that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge-waste and cement such that the 'pondcrete' blocks would rapidly disintegrate thus creating additional contamination problems" *Stone v. Rockwell International Corp.* at p. 801.

That is the most explicit statement in the record and while it is evidence of what Mr. Stone then knew, it is not evidence of what information Mr. Stone submitted to the government before the filing of the original complaint. The disclosure must be made prior to filing the complaint according to the express language of § 3730(e)(4) and as made clear in *King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001), cert. denied, 122 S.Ct. 1205 (2002). Accordingly, the disclosure statement has been disregarded in these findings.

With respect to the spray irrigation claims, Mr. Stone's affidavit refers to the complaint he filed in the Jefferson

County District Court, attached as Exhibit P which included the following paragraph:

> (b) On December 1, 1980, plaintiff recorded an objection to pumping nitrate enriched wastewater from the east side of the RFP to the west side, for disposal by irrigation, in lieu of simply siphoning the wastewater to lower terraces on the east side. Plaintiffs concern was to reduce the migration of groundwater through contaminated soil on plant-site toward domestic water reservoirs, and to reduce cost. Defendant ignored the plaintiffs engineering report. (Paragraph 5b) Vol. I, p. 477.

The claim submitted to the jury at trial was surface runoff of spray irrigated effluent into Woman Creek from the east spray fields. No information specific to that matter was disclosed.

The foregoing findings are submitted without expressing any legal conclusions as to their significance under the controlling law because such legal conclusions are not considered to be within the scope of the limited remand. Although the appellate court's order directed this court to make findings and conclusions with respect to the claims that ultimately went to trial it is not the prerogative of this court to determine whether the information required to be disclosed before trial is to be considered as that which supports the allegations of the original complaint as contrasted with the amended pleadings and the claims submitted to the jury.

It is now

ORDERED that these findings and conclusions be forwarded to the Clerk of the Tenth Circuit Court of Appeals together with the papers filed in this court subsequent to the order of limited remand as a supplemental record on the pending appeal.

Dated: December 17th, 2002

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

31 U.S.C. § 3730

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

* * *

(e) Certain actions barred.

* * *

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government [General] Accounting Office report, hearing audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

* * *

UNITED STATES CONSTITUTION
ARTICLE II

Section 1.
The executive Power shall be vested in a President of the United States of America.

* * *

Section 2.

* * *

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * *

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3.

He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene

both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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